UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

RIDGEWOOD HEALTH CARE CENTER, INC. AND RIDGEWOOD HEALTH SERVICES, INC., A SINGLE EMPLOYER	)	
and	)	**Case 10-CA-113669**
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (USW), AFL-CIO	)	

RESPONDENTS' POST-HEARING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION

The General Counsel alleges that Joette Kelley Brown, a small business owner, engaged in a scheme to avoid becoming a successor when she took over the operation of the Ridgeview Health Care facility from Preferred Health Holdings. The General Counsel however did not support this conspiracy theory with actual evidence at trial. Rather, the evidence established that Ms. Brown encouraged Preferred employees to apply; gave them preference in application; hired most of them; did not hire a few for legitimate reasons that also applied to non-Preferred applicants; and followed the law by not recognizing the USW when not enough Preferred employees applied and thus did not constitute a majority of the bargaining unit at the Ridgewood facility.

The General Counsel's theory that Ms. Brown did not hire certain employees in order avoid bargaining obligations is nonsensical in light of the fact that Ms. Brown had meetings in which she encouraged Preferred employees to apply; she hired a far greater percentage of Preferred applicants than non-Preferred applicants; she made offers to Preferred employees who did not accept offers; and she rejected non-Preferred applicants for the same reasons that she rejected Preferred applicants. Moreover, some Preferred and non-Preferred applicants did not show up to work on the first day of operations. The idea that Ms. Brown orchestrated such a narrow margin of non-Preferred employees over Preferred employees (51 to 49) is impossible to believe.

Also impossible to believe is the General Counsel's theory that Ms. Brown created the position of Helping Hands in order to add non-Preferred employees to the bargaining unit. The contract between Preferred and the USW is very clear that all nurse's aides are covered, regardless of their name and whether they are certified, and there was ample evidence presented at the hearing that Helping Hands perform nursing aide duties. Also, Helping Hands was a

position that Ms. Brown had used successfully for many years at her other facility, Ridgeview, and she did not create it for any unlawful purpose at Ridgewood.

The General Counsel also alleged union animus on the part of Ms. Brown, but that argument also fails. The General Counsel alleges that Ms. Brown's opinion that a union is not necessary shows animus, but the law is very clear that an employer has the right to hold that opinion and to express it. Moreover, Ms. Brown also held the opinion that she could work well with a union, as in fact she had done so for many years at Ridgeview, and she expressed that opinion as well. Most importantly, there is no evidence that Ms. Brown was motivated by union animus in her actions. She hired the only employees she knew to be union supporters, Cindy Dudley and Joann Tidwell. While the General Counsel alleges that she or the other interviewers interrogated applicants about their union membership, an allegation which Ms. Brown and the other interviewers denied, the evidence reflects that those applicants that supposedly revealed that they were union members were offered jobs with the company. The General Counsel's evidence of alleged animus is not only very weak, any connection between any such animus and Ms. Brown's hiring decisions is non-existent.

Finally, the USW improperly attempts to interject two additional theories in the case. First, the USW seems to allege that Ms. Brown should have relied on Preferred's staffing practices and hired fewer employees. However, the evidence reflects that Ms. Brown hired employees at less than the ratio of employees to patients that she used at Ridgeview, and the USW's reliance on Preferred's hiring practices is not only irrelevant but also unpersuasive since Preferred employees testified that the Preferred operations were understaffed. The USW also appears to argue that if Ms. Brown's company was a successor under the law, it could not initially set the terms and conditions of employment upon takeover of the operations, because it was a perfectly clear successor. This position fails because Preferred did not contribute the

majority of the bargaining unit at RHS and because Ms. Brown made clear to the USW and the Preferred applicants before they accepted employment with the company that the company did not accept the contract between Preferred and the USW and that the terms and conditions of employment would change.

In summary, the low turnout of Preferred employees caught everyone by surprise, but the evidence convincingly establishes that Ms. Brown followed the law in hiring and selecting applicants for employment with her company. The evidence also establishes that because Preferred employees did not constitute a majority of the bargaining unit, Ms. Brown followed the law in not recognizing the USW as their representative. Because the USW does not represent the employees at the Ridgewood facility, Ms. Brown can implement the terms and conditions of employment that she believes are necessary to operate the facility without violating the NLRA.

II. STATEMENT OF PRIOR PROCEEDINGS

On August 19, 2013, the the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (hereinafter the "USW") filed an unfair labor practice charge against Ridgewood Health Care Center ("RHCC") alleging that it violated § 8(a)(5) of the NLRA by repudiating the collective bargaining agreement between Preferred and the USW.[1] On September 19, 2013, the USW amended and added to the August 19, 2013 charge, filing a § 8(a)(5) unfair labor practice charge, 10-CA-113669, against Ridgewood Health Care Center and other entities alleging, generally, that the "employer" unlawfully refused to recognize and bargain with the union, laid off employees, and made unilateral changes to terms and conditions of employment, including seniority, health insurance and wage rates. On February 5, 2014, the USW filed a § 8(a)(1), (3), and (5) first amended

[1] See USW Unfair Labor Practice Charge, 10-CA-111458, filed August 19, 2013, available at http://nlrb.gov/case/10-CA-111458, and attached as "Exhibit A" to this Brief. Keren Wheeler of the USW Legal Department signed the charge declaring it to be true to the best of her knowledge and belief on August 12, 2013.

charge against Ridgewood Health Care Center Inc. and Ridgewood Health Services, Inc. alleging that the "employer" unlawfully failed to recognize and bargain with the union after it "employed a representative complement of predecessor employees," refused to hire certain applicants as part of a scheme, interrogated applicants, and changed terms and conditions of employment. (GX-1(c)). On August 28, 2014, The General Counsel issued a Complaint and Notice of Hearing pertaining to charge 10-CA-113669. (GX-1(k)).

On September 5, 2014, the USW filed a § 8(a)(5) unfair labor practice charge, 10-CA-136190, and, later, two amended charges, against RHS alleging that the company unilaterally disciplined and terminated certain employees without giving the Union notice or opportunity to bargain. (GX-1(e), (g), (i)). The General Counsel issued an Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing on December 3, 2014, consolidating the charges filed, 10-CA-113669 and 10-CA-136190. (GX-1(r)). Respondents filed timely answers to the original and Amended Complaint denying the material averments. (GX-1(o))

The Hearing on the Amended Consolidated Complaint was conducted December 15 through December 17, 2014 in Birmingham, Alabama before the Honorable Michael A. Rosas.

III. STATEMENT OF FACTS

A. Joette Kelley Brown, Her Operation of the Ridgeview Facility and Her Purchase of the Ridgewood Facility.

Since 2008, Joette Kelley Brown has owned Ridgeview Health Services, Inc. ("Ridgeview") which operates a nursing facility in Walker County, Alabama.[2] Ms. Brown had grown up working in the facility. The facility is licensed for 148 beds (i.e., nursing care residents) and employs 220 people, 25 of whom are supervisory or administrative employees.

[2] T 404-405 (Brown). In record cites, the transcript is abbreviated "T." After each cite, the page number and the witness testifying is listed. Joint exhibits are labeled "J", Respondent's exhibits are labeled"RX" and General Counsel's exhibits are labeled "GX." The Parties' Joint Stipulated Facts is exhibit "J-2," and the corresponding paragraph number will follow the cite.

Employees at the Ridgeview facility had long been represented by a labor union other than the USW, and the company had a good relationship with the union.[3] That union has never filed any unfair labor practice charges against the company.[4]

In 2008, Ms. Brown also purchased Ridgewood Health Care Center, Inc. ("RHCC").[5] For the last twenty years, the facility has been operated as a nursing home, but RHCC has owned only the "bricks and mortar" of the facility. [6] RHCC's only source of revenue is lease payments, and it has never had any employees, nor any involvement in the day-to-day operation of the facility.[7]

From 2002 to September 30, 2013, Preferred Health Holdings II, LLC ("Preferred") leased and operated the nursing home facility owned by RHCC.[8] Preferred is owned by Jim Walker. Under the lease, Preferred was responsible for the complete operation of the facility.[9] The facility is licensed for 98 beds,[10] and, in July 2013, Preferred employed 141 employees in the facility (139 hourly, 2 salary).[11] The USW was the exclusive collective bargaining representative for most of the facility's employees.[12] The USW and Preferred negotiated a

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[3] T 409 (Brown); T 615 (Holland); T 648 (Warren).

[4] T 409 (Brown)

[5] J-2, ¶5.

[6] T 405-406 (Brown).

[7] T 405-406 (Brown).

[8] T 404-406 (Brown).

[9] T 406 (Brown).

[10] T 547 (Brown).

[11] J-4.

[12] T 294-295 (Dudley).

collective bargaining agreement ("CBA") that was set to expire on September 14, 2016.[13] The CBA provided as follows:

> Pursuant to the certification of representative issued by the National Labor Relations Board on April 26, 1976, in Case No. 10-RC-10625, the Company agrees to recognize the Union as the exclusive representative of all full-time and regular part-time employees employed by the Company at its Jasper, Alabama facility including LPN's, nurse's aides, housekeeping employees, dietary employees, laundry employees, maintenance employees and the food supervisor (it is understood that in the event any of the preceding job titles are changed they will remain in the bargaining unit) but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Ms. Brown had no involvement with the USW or the CBA at the Ridgewood facility.[14]

In 2012, Mr. Walker wanted to reduce his lease payments to RHCC because of a decrease in the Medicaid rate.[15] The companies litigated the issue in arbitration, and the arbitrator held that Mr. Walker could not reduce his lease payments.[16] Preferred and RHCC thereafter decided to terminate the lease agreement effective September 30, 2013.[17] On October 1, 2013, Ridgewood Health Services, Inc. ("RHS"), an entity formed by Ms. Brown to lease and operate the facility owned by RHCC after Preferred's lease and operation of the facility ended, began operating the nursing home facility.[18]

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[13] J-3.

[14] T 406-407 (Brown).

[15] T 412 (Brown).

[16] T 412-413 (Brown).

[17] T 411-13 (Brown).

[18] J-2, ¶3; T 413-14, 514, 543 (Brown).

B. The Transition of Operation of the Facility from Preferred to RHS.

In anticipation of the end of its lease with RHCC, Preferred decided that it would lay off its employees at the Ridgewood facility.[19] Ms. Brown had developed a successful business model at the Ridgeview facility, and she wished to implement her successful business practices at RHS.[20] Ms. Brown had established a great reputation for patient care in the community and wanted to staff the facility to continue that reputation.[21] Ms. Brown decided that to staff the Ridgewood facility she would use the hiring process that she was accustomed to at Ridgeview.[22] Her hope was that Preferred's employees would go through the process and that she would hire the majority of them.[23]

Ms. Brown also decided to use the position of Helping Hands at the Ridgewood facility. For the past seven to eight years,[24] Ridgeview had split nursing aide duties between a certified position called CNA and a non-certified position called Helping Hands.[25] Ms. Brown found that "[e]mployees liked it, families liked it, residents loved it."[26] The evidence presented at trial clearly established that Helping Hands perform nursing aide duties.[27]

On July 29, 2015, Preferred notified the employees and the USW that it was ceasing operations of the facility and that the employees would be laid off effective September 31, 2015.

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[19] T 414 (Brown)

[20] T 407, 414 (Brown)

[21] T 590 (Brown)

[22] T 414 (Brown).

[23] T 414-416 (Brown).

[24] T 520 (Brown)

[25] T 407 (Brown); T 615-616 (Holland); T 648 (Warren)

[26] T 502 (Brown)

[27] T 307-308 (Dudley); T 162-163 (Thomas); T 407-408 (Brown); T 615-616 (Holland)

Preferred also let the employees know that the new company had not agreed that any of Preferred's employees would be hired.[28] Likewise, on July 15, 2013, an attorney representing Ms. Brown sent a letter to the USW informing it that Preferred's lease agreement would be expiring and that a new company would begin operation of the facility.[29] In this letter, Ms. Brown expressed a willingness to bargain with the USW. She did so because at the time, she believed that through the hiring process she would end up with a majority of Preferred employees and would be obligated to bargain with the USW.[30] She informed the USW however that the current CBA between the USW and Preferred was unacceptable and that she rejected it.[31] Ms. Brown never believed that she was obligated to adhere to the CBA.[32] The Preferred employees knew that Ms. Brown had rejected the contract, and they were upset about it.[33]

C. Ms. Brown's Meetings with Preferred Employees.

In the summer of 2013, Ms. Brown, and Ms. Brown's sister, Alicia Stewart, had some "get-to-know-each-other" meetings with some Preferred employees.[34] The first meeting was attended by Ms. Brown, Ms. Stewart and Mr. Walker and about 20 to 35 Preferred employees.[35] In that meeting, Ms. Brown introduced herself and encouraged the employees to apply to work with her company.[36] In August, 2013, Ms. Brown and Ms. Stewart had smaller meetings with

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[28] J-5; J-2, ¶ 26

[29] J-4; T 415-416 (Brown)

[30] T 415-416, 601-602 (Brown).

[31] J-4; T 416 (Brown); T 311 (Dudley)

[32] T 416 (Brown)

[33] T 311-312 (Dudley)

[34] T 417-418 (Brown).

[35] T 417 (Brown); T 75, 81-82 (Eaton); T 55 (Kimbrell); T 352 (Collett); T 101 (McPherson)

[36] T 417 (Brown).

some Preferred employees to again introduce themselves and their business philosophy and to encourage them to apply.[37]

The General Counsel and the Union have made some allegations about statements made by Ms. Brown in these meetings, which are addressed below:

1. Ms. Brown did not guarantee anyone employment.

Ms. Brown wanted the Preferred employees to apply and work for her.[38] However, Ms. Brown explained in the meetings that the employees had to go through the hiring process, and she never guaranteed them employment with her company.[39] Some of the General Counsel's witnesses claimed that Ms. Brown stated that she would hire 99.9% of Preferred's employees. Ms. Brown does not recall making that statement.[40] Regardless, the employees knew they had to go through the application process. For example, Ms. Eaton testified that she knew all along that she had to go through the application process.[41] Ms. Kimble also testified that Ms. Brown said Preferred employees would go through the application process and would be "considered" for hire.[42] Furthermore, at the same meeting where Ms. Brown allegedly told employees she would hire 99.9% of them, she told them insurance benefits would change.[43]

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[37] T 418 (Brown).

[38] T 419 (Brown).

[39] T 425 (Brown); T 221 (P. Borden) (They "told us we had to fill out the application to be able to reapply again.")

[40] T 418 (Brown)

[41] T 74-77 (Eaton).

[42] T 67 (Kimble)

[43] T 57-59, 66-67 (Kimbrell).

2. Ms. Brown and Ms. Stewart made clear that terms and conditions of employment were being evaluated and that there needed to be some changes.

The evidence is overwhelming that before any employees were hired or even went through the application process, Ms. Brown and Ms. Stewart made clear that terms and conditions of employment were being evaluated and that changes were needed.[44] For example, the General Counsel and USW's witnesses testified that in the meetings with the Preferred employees, Ms. Brown and Ms. Stewart stated as follows:

- Stephanie Eaton – The benefits could not stay the same. If benefits had to stay the same, pay would go down. Have to start over with vacation days, sick days, and things of that nature. Definitely wouldn't be able to afford benefits like they had been. Company starting at zero dollars, like a new company. We would all be new hires. Some policies and procedures would stay the same and some wouldn't. Union contract was up for negotiation and there were things that would need to be negotiated. Pay or benefits would have to be decreased.[45]
- Becky Ramos – Would keep pay same or close to what it was but checking into benefits.[46]
- Hope Kimbrell – Although pay would probably be the same, would not commit to exact amount. Had to work with them regarding the insurance.[47]
- Debra Thomas – There would be some changes at the facility. There would be Helping Hands; disposable diapers; Baylor shifts; and Christmas clubs.[48]
- Paul Borden – They were still discussing whether they would use Ridgeview's insurance or keep the insurance the same.[49]
- Melissa Uptain – We would have to give up some of our wages. Talked about Christmas bonuses that the facility had never had.[50]
- Debra Puckett – They were going to get more supplies, Helping Hands, and a Make a Wish program. Job status would start from day 1, no seniority. Not sure how insurance and benefits were going to work out.[51]

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[44] T 418-419 (Brown).

[45] T 78, 86-88 (Eaton)

[46] T 149 (Ramos)

[47] T 67-68 (Kimbrell)

[48] T 158, 163, 168 (Thomas)

[49] T 220 (Borden)

[50] T 232 (Uptain)

[51] T 260-261 (Puckett)

- Audrie Borden – Might have to give up some on insurance and other things. Might have to change PTO time.[52]
- Chris Collett – Starting off as new hires so pay probably would not be what making now.[53]

3. Ms. Brown's statement about if it isn't broke, we aren't going to fix it was only about the shower team.

During the first meeting, Debra Thomas asked Ms. Brown if she was going to keep the shower team.[54] The shower team was a group of CNAs that bathed and dressed residents.[55] Ms. Brown's response to the question about the shower team was "if it's not broken, we're not going to fix it."[56] This exchange between Ms. Thomas and Ms. Brown was not about any other term or conditions of employment or the union contract.[57]

4. Ms. Brown did not make any derogatory statements or promises about unions.

The clear weight of the evidence establishes that Ms. Brown told the employees that they had a union at Ridgeview and that it was a good relationship.[58] Lynda Baker testified that Ms. Brown said they had a union with nine members, and "that they settled everything without, without having to have any grievances or anything, that her and the president settled things."[59] According to Ms. Baker, Ms. Brown did not say whether they would have a union after

[52] T 343, 346 (A. Borden)

[53] T 354 (Collett)

[54] T 156 (Thomas).

[55] T 157 (Thomas)

[56] T 156 (Thomas); T 507-508 (Brown); T 219 (P. Borden)

[57] T 156-157 (Thomas); T 508 (Brown); T 66 (Kimbrell)

[58] T 420 (Brown).

[59] T 43 (Baker)

September 30.[60] Melissa Uptain testified that Ms. Brown said "that they had a union at Ridgeview; that if there is a problem, then the union president has a problem, then the president came to her and they worked it out."[61] According to Becky Ramos, Ms. Brown said "they're not filing grievances over there [Ridgeview] because they work so well together."[62] She testified that Ms. Brown made clear that they deal with the union at Ridgeview and don't have problems dealing with the union.[63] Teresa Haynes also testified that she does not remember Ms. Brown saying anything about whether the union would represent the employees after September 30.[64] Cindy Dudley provided an affidavit to the NLRB in August, 2013, testifying that she never heard any RHS management officials say anything negative about the union.[65]

Ms. Brown never said she would have to honor the contract between Preferred and the USW.[66] In a meeting, Debra Thomas asked Ms. Brown about the union contract, and Ms. Brown's response was that she was starting with zero dollars and that everyone would be starting out as a new hire.[67]

D. <u>The Hiring Process for RHS.</u>

RHS began the hiring process for the Ridgewood facility in August, 2013.[68]

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[60] T 43 (Baker)

[61] T 240 (Uptain)

[62] T 148 (Ramos)

[63] T 151 (Ramos)

[64] T 29 (Haynes)

[65] T 312 (Dudley)

[66] T 419 (Brown)

[67] T 169, 171-172 (Thomas)

[68] T 415 (Brown)

1. RHS provided a preferential application period for Preferred employees.

RHS provided Preferred employees three weeks to apply or make an appointment to apply for positions before it accepted applications from outside individuals.[69] In early August, 2013, notices to Preferred employees that contained application instructions and the deadline to call to schedule an application appointment were posted near the facility time clock.[70] Preferred employees were asked to apply or make an appointment to apply by August 30.[71]

The three week time period was designed to give Preferred's employees the first chance for the available positions.[72] The company maintained extended hours for application appointments to accommodate the schedules of the Preferred employees.[73] At one point, Ms. Brown extended the application deadline by one week because the number of Preferred applicants was low, and she wanted to make sure that they had ample time to apply.[74] No Preferred employee attempted to apply with RHS after the application deadline, or was denied employment with RHS on that basis.[75]

The three week window also allowed RHS to anticipate how many additional employees it would need to hire to operate the facility.[76] After the deadline for Preferred employees to apply had passed, the company opened up the application process to other applicants.[77]

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[69] J-2, 29

[70] J-2, ¶ 30; T 45 (Baker); T 59 (Kimbrell); T 79 (Harrison); T 266 (Dudley); T 130 (Wilbert)

[71] T 421-422 (Brown); J-2, ¶29.

[72] T 423 (Brown).

[73] T 422 (Brown); T 650 (Warren)

[74] T 422, 525 (Brown); T 650 (Warren)

[75] T 422 (Brown).

[76] T 421 (Brown).

[77] T 423 (Brown)

2. RHS used the same hiring process and criteria for Preferred and Non-Preferred applicants.

The same hiring criteria applied to Preferred and non-Preferred applicants.[78] A nursing home is in the business of "taking care of others," and Ms. Brown wanted to staff the facility with presentable, kind, honest, genuine people to work with the senior residents.[79] She wanted employees who could interact well with residents, their families and other employees.[80] She also looked at work history, experience and other qualifications.[81]

The application process included completing an application, a drug test and an interview usually all on the day of the application appointment.[82] After that step, background and reference checks were conducted.[83] Individuals that RHS planned to hire were sent for a physical examination.[84] However, if RHS learned about something that disqualified them for employment after they took a physical, they were not hired.[85] The time period between the various phases of the hiring process varied.[86] Individuals that were hired were sent an offer letter stating that employment with RHS was "at-will" and explaining that RHS would set the terms and conditions of employment.[87] Individuals who were not selected were sent a letter informing

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[78] T 424 (Brown); T 665, 702 (Warren)

[79] T 424-425 (Brown); T 617 (Holland) (it's the "residents home" and you want to hire the "best possible employees" for them).

[80] T 424-425 (Brown)

[81] T 424 (Brown)

[82] T 92 (Waldrop); 651-652 (Warren).

[83] T 649, 652, 681, 702 (Warren)

[84] T 566-567 (Brown); T 649 (Warren)

[85] T 567 (Brown)

[86] T 653, 681 (Warren); T 187 (Eads)

[87] J-2, 12

them they would not be hired.[88] Letters to Preferred and non-Preferred employees were not sent on any certain date or in any certain order but just as the company got to them.[89] The process was at times chaotic because RHS was attempting to process numerous applicants in various stages of the process.[90]

For as long as any witness could remember, Ridgeview had a rule that it would not re-hire employees at Ridgeview who were marked as ineligible for re-hire.[91] Employees could be marked as ineligible for re-hire for a variety of reasons, such as absenteeism, discipline matters, job abandonment and poor performance.[92] Ms. Brown decided that she would not hire any applicants for employment at RHS that were marked as ineligible for rehire at Ridgeview.[93] Thus, for all applicants (whether Preferred or non-Preferred), RHS checked Ridgeview records to see if the applicant had worked at Ridgeview and whether they were eligible for re-hire there.[94] If the applicant was ineligible for re-hire at Ridgeview, he or she was not hired by RHS.[95] Ms. Brown made this decision because she did not want employees who had not had successful employment at Ridgeview to work with RHS.[96] RHS applied the no re-hire rule consistently to all applicants (Preferred and non-Preferred), without exception, during the hiring process.[97]

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[88] J-2, 13

[89] T 429, 564-566 (Brown)

[90] T 426 (Brown)

[91] T 408-409 (Brown); T 649, 680 (Warren); T 616, 645 (Holland)

[92] T 649 (Warren)

[93] T 438-439 (Brown)

[94] T 438-439 (Brown)

[95] T 438-439 (Brown)

[96] T 439 (Brown); T 649 (Warren)

[97] T 438-439, 484-485, 497 (Brown); T 702 (Warren)

3. RHS used the same interview process for Preferred and Non-Preferred applicants.

Applicants were interviewed in August and September, and interviewers included Ms. Brown, Ms. Stewart, Kara Holland (Ridgeview Administrator), SuLeigh Warren (Human Resource Director)[98] and Vicky Burrell (Ridgeview Director of Nursing), depending on their availability.[99] The interviewers were selected because most of them had long worked with Ms. Brown and knew her hiring standards and expectations.[100] Usually two to three of the interviewers were present for each interview.[101] One person kept contemporaneous notes during each interview.[102]

The interviewers applied the same criteria to interviews of Preferred and non-Preferred applicants.[103] The interview allowed RHS to learn about the applicant's qualifications, experience, personality, attitude and presentation and to get to know them.[104] Applicants were asked about themselves, what they liked about the facility, what they would improve, if there was a team environment, and some applicants were asked about benefits because the company was still trying to determine what benefits to offer.[105]

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[98] T 648 (Warren)

[99] T 425, 451 (Brown); J-2, ¶ 16; T 616-617 (Holland); T 651-652 (Warren)

[100] T 425 (Brown). SuLeigh Warren was the only interviewer who had not worked for a long period of time with Ms. Brown. She began employment on July 29, 2013. (T 647 (Warren)).

[101] T 425 (Brown); T 617 (Holland)

[102] T 500 (Brown)

[103] T 617 (Holland)

[104] T 426 (Brown); T 617 (Holland)

[105] T 426-427 (Brown); T 617-618 (Holland); T 652 (Warren)

Following the interview, the interviewers made recommendations about whether the applicant should be hired. [106] The interviewers did not know if any applicant was a union member and did not say anything to Ms. Brown about whether an applicant was in the union.[107] It did not matter to Ms. Brown if an applicant supported the union, and she did not make hiring decisions based on whether an applicant supported the union.[108]

4. RHS did not interrogate employees about union affiliation.

The General Counsel alleges that RHS interrogated some Preferred employees in their interviews. The interviewers denied that they asked any employee about their union affiliation or if individuals had union dues deducted from their paychecks.[109] In all cases, those employees who alleged that they revealed that they were union members were offered employment with RHS. The testimony at the hearing regarding the interviews was as follows:

- Teresa Haynes – was not asked any questions about the union.[110] She was hired.
- Lynda Baker - was not asked any questions about the union.[111] She was hired.
- Hope Kimbrell (alleged discriminatee) - was not asked any questions about the union.[112] She was not hired.
- Stephanie Eaton – claimed she was asked if she was in the union. Claimed she was asked about deductions, and she told the interviewers that union dues were taken out of her check. She was offered a job but turned it down.[113]
- Marcus Waldrop (alleged discriminatee) – claimed he was asked about deductions, and he told the interviewers that union dues were deducted from his check. [114] He was hired after he took the physical.

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[106] T 145, 427-428 (Brown); T 618, 620 (Holland); T 653 (Warren)

[107] T 427-428 (Brown); T 618 (Holland)

[108] T 428 (Brown) ("We've had a union at Ridgeview. It didn't matter to me.")

[109] T 427 (Brown); T 618 (Holland); T 651 (Warren)

[110] T 28 (Haynes)

[111] T 46 (Baker)

[112] T 63 (Kimbrell)

[113] T 82 (Eaton)

- Pam McPherson – claimed she was asked if she was in the union, and she responded "no."[115] She was not in the bargaining unit, and was not hired.
- Crystal Wilbert – claimed she voluntarily told interviewers she was a union member, interviewer asked how the union worked, she said she couldn't explain that and interviewer said that was fine.[116] She was hired.
- Teresa Diane McLain (alleged discriminatee) - was not asked any questions about the union.[117] She was not hired.
- Becky Ramos – claimed she was asked about deductions, and she told interviewers that union dues were deducted from her check. Interviewer followed up on vision insurance but not the union.[118] She was hired.
- Debra Thomas – claimed she asked the interviewer if she was going to ask her if she was in the union because she had heard a rumor that the interviewer was asking that question. The interviewer said "I'm not asking people if they are in the Union." The interviewer did not ask her if she was in the union.[119] She was hired.
- Gina Eads (alleged discriminatee) - was not asked any questions about the union.[120] She was not hired.
- Joann Tidwell - was not asked any questions about the union.[121] She was hired.
- Paul Borden (alleged discriminatee) - claimed he was asked if he was in the union and he said "no."[122] He was not hired.
- Melissa Uptain - was not asked any questions about the union.[123] She was offered a job but turned it down.[124]
- Betty Davis (alleged discriminatee) - was not asked any questions about the union.[125] She was not hired.
- Audrie Borden – claimed she was asked if she was in the union.[126] She was hired.

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[114] T 84 (Waldrop)

[115] T 103 (McPherson)

[116] T 131 (Wilbert)

[117] T 142 (McLain)

[118] T 150, 152 (Ramos)

[119] T 171 (Thomas)

[120] T 186 (Eads)

[121] T 201 (Tidwell)

[122] T 222 (P. Borden)

[123] T 238 (Uptain)

[124] T 233 (Uptain)

[125] T 256 (Davis)

Ms. Brown testified that the only employees that she knew were union members were Cindy Dudley and Joann Tidwell, and she knew that Ms. Dudley was the union steward.[127] Ms. Brown hired both of those individuals.

E. RHS Never Employed a Majority of Bargaining Unit Employees Who Worked for Preferred and Thus Never Recognized the Union.

Although RHS expected to hire most Preferred employees who applied for employment, at the time RHS began accepting applications for employment in August 2013, it did not know how many Preferred employees would apply, how many would meet its hiring criteria, or how many would need to be hired outside of Preferred employees.[128] Out of the 141 Preferred employees, RHS unexpectedly received only sixty-five (65) applications from Preferred employees for bargaining unit positions by August 30, 2013,[129] and therefore it became apparent at that time that it would need to hire a substantial number of employees outside of the Preferred employees to fill its operational needs.[130]

Ms. Brown felt that to adequately staff the Ridgewood facility like she was used to staffing the Ridgeview facility, she needed a lot more people.[131] Even if all of Preferred's employees had applied, RHS would need more employees because Preferred was understaffed at the time RHS took over operations.[132] In fact, Preferred had implemented a hiring freeze.[133]

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[126] T 339 (A. Borden)

[127] T 427 (Brown); T 303 (Dudley)

[128] T 421 (Brown)

[129] J-2, 34; T 421-424, 428-429 (Brown)

[130] T 422-423 (Brown)

[131] T 423, 590 (Brown) ("I want these residents to be treated like they were to be treated at home. One-on-one care, great care. I've got a great name in the community, and I needed more people to care for these residents.")

[132] T 500-502, 544 (Brown); T 630 (Holland); T 170 (Thomas)

[133] T 544 (Brown)

Preferred employees told Ms. Brown and the interviewers that the facility needed more staff and supplies.[134] Debra Thomas (CNA) testified that in September, 2013, she had to work a lot of overtime because the facility was short staffed.[135] Chris Collett, Preferred's DON, testified that staffing and the patient census had declined in the months leading up to October, 2013.[136]

When RHS opened the application process up to non-Preferred applicants, it received 111 applications for bargaining unit positions.[137] It is a stipulated fact that RHS hired 51 employees employed by Preferred and hired 56 employees who were not employed by Preferred to begin working at the facility on October 1, 2013, performing work which had been performed by the positions in Preferred's bargaining unit.[138] Based on the number of applications received, a far greater percentage of Preferred applicants[139] were hired in comparison to outside applicants when RHS began operation of the facility on October 1, 2013:[140]

	Number of Applicants	**Number of Applicants Hired**	**Percentage Hired**
Preferred	65	51	78.5%
Outside	111	56	50.4%

Six Preferred and non-Preferred applicants who had accepted employment with RHS did not show up for work.[141] Therefore, it is a stipulated fact that on October 1, 2013, RHS began operations with 101 employees in positions performing work which had been performed by the

[134] RX-14; T (701) Warren; T 502 (Brown); T 630 (Holland)

[135] T 170 (Thomas)

[136] T 396-397 (Collett)

[137] J-2, ¶ 33; T 423 (Brown)

[138] J-35; T 428-429 (Brown)

[139] Indeed, only 39.6% of applicants had been employed by Preferred.

[140] J-2, ¶ 35

[141] J-2, ¶ 36

positions in Preferred's bargaining unit, 49 of whom were previously employed at the facility by Preferred.[142] RHS offered jobs to more than 49 Preferred employees, but some of them did not accept the offers.[143]

It also is a stipulated fact that RHS hired an additional twenty-two (22) outside, non-Preferred applicants in the six (6) weeks after October 1, 2013.[144] Ms. Brown believed that with better management, and Ridgeview's positive reputation in the community associated with the facility, patient census levels would increase, and she staffed the facility accordingly.[145] Even with the patient census that existed on October 1, the facility started operations short on staff, and they were only able to schedule one to two days at a time.[146]

After October 1, 2013, the patient census did rise, from an 81.1 average in October, 2013,[147] to a monthly average of 91.3 in April 2014, but gradually declined (with monthly variations) to an average of 88.0 in December 2014. (GC 9). When patient census levels fall, RHS does not terminate employees; however, less employees are scheduled, and part-time employees sometimes leave for other jobs.[148] Since October 1, 2013, RHS has continued to employ more employees than it did when it began operations.[149] Neither on October 1, 2013, nor

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[142] J-2, ¶ 37

[143] T 629-630 (Holland); T 73, 82 (Eaton)

[144] T 504 (Brown); J-2, ¶ 38

[145] T 504-505 (Brown)

[146] T 116 (Bolinger); T 589 (Brown); T 267, 306-307 (Dudley)

[147] T 525 (Brown)

[148] T 505-506 (Brown); T 304-305 (Dudley)

[149] T 593, 595-596 (Brown). The undisputed evidence is that RHS maintained more than 100 employees throughout 2014. There is no evidence that the schedules list all bargaining unit employees. For example, RHS does not use a maintenance schedule, employees on leave are not on the schedules, and some other bargaining unit roles are not listed on the schedules. Ms. Brown's testimony regarding the bargaining unit is supported by RHS schedules themselves which demonstrate that RHS continued to maintain more sufficient staffing than had Preferred

at any time thereafter has RHS employed a majority of bargaining unit employees who previously worked for Preferred and were covered by the CBA between Preferred and the USW.[150]

By the end of August or early September, after realizing that not as many Preferred employees had applied as expected, Ms. Brown began to believe that she would not recognize the USW as the representative of the of the bargaining unit employees.[151] After October 1, when it was clear that Preferred employees did not constitute a majority of the bargaining unit, she knew for sure that she would not recognize the USW.[152] Ms. Brown explained to the employees that the reason she was not recognizing the union was that there were not enough former Preferred employees to keep the union in.[153] She also explained to the employees that she was willing for there to be an election in which the employees could vote for whether they wanted to be represented by the union.[154]

F. <u>All Selection Decisions Were Made for Legitimate, Non-Discriminatory Reasons</u>

All applicants who were not hired by RHS were not hired because of legitimate, non-discriminatory hiring criteria. No hiring decisions were based on whether an applicant supported the union or whether the applicant formerly worked at Preferred.[155] With regard to specific

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throughout 2014. <u>See id.</u>; CP11-13 (schedules for August 2014 and October 2014 demonstrate more than 100 bargaining unit employees employed (CP 10 is incomplete)).

[150] T 503-504 (Brown)

[151] T 600 (Brown)

[152] T 600-601 (Brown)

[153] T 314 (Dudley)

[154] T 174-175 (Thomas)

[155] T 436, 440, 445, 458, 471, 475, 478 (Brown); T 618 (Holland); T 673 (Warren)

Preferred employees not hired by RHS and challenged by the General Counsel, each was not hired for the following legitimate, non-discriminatory reason(s):

i. Lacee Cox

The parties stipulated that applicant Ms. Cox was terminated from Ridgeview,[156] and her Ridgeview discharge papers state that she was not eligible for rehire because of unsatisfactory work.[157] Because Ms. Cox was ineligible for rehire at Ridgeview, she was ineligible for hire at RHS and not selected for that reason.[158] RHS applied the same no re-hire rule to non-Preferred applicants. For example, non-Preferred applicants Debra Pittman (LPN),[159] Latoya Tatum (CNA),[160] Arthur Thomas (CNA),[161] and Erin Sanford (Helping Hand)[162] were not hired because they were ineligible for re-hire at Ridgeview.

Even if Ms. Cox had been eligible for re-hire, she would not have been hired because during her interview, she was unfriendly, did not smile and acted like she did not want to be there.[163] Ms. Warren, who interviewed Ms. Cox, took contemporaneous notes during the interview, and her notes are consistent with her testimony ("unfriendly; did not smile"). As such, Ms. Warren recommended that Ms. Cox not be hired.[164] Thus, even had Ms. Cox been eligible

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[156] J-2, ¶ 43

[157] RX-3

[158] T 657-658 (Warren)

[159] T 484 (Brown); T 667 (Warren); RX-26 and 27

[160] T 497 (Brown); RX-35

[161] T 665-666 (Warren); RX-34; T 496 (Brown)

[162] T 666 (Warren); RX-33; T 494 (Brown)

[163]T 439-440 (Brown); T 656-657 (Warren)

[164] T 657-658 (Warren)

for hire, she would not have been hired because of her interview. Ms. Cox did not testify to refute RHS' legitimate, non-discriminatory reasons.

ii. Betty Davis

The parties stipulated that applicant Betty Davis was terminated from Ridgeview.[165] Ms. Davis admitted she was terminated,[166] and her Ridgeview discharge papers state she was not eligible for rehire.[167] Because Ms. Davis was ineligible for re-hire at Ridgeview, Ms. Davis was not hired.[168] RHS applied the same no re-hire rule to non-Preferred applicants. For example, non-Preferred applicants Debra Pittman (LPN),[169] Latoya Tatum (CNA),[170] Arthur Thomas (CNA),[171] and Erin Sanford (Helping Hand)[172] were not hired because they were ineligible for re-hire at Ridgeview. Upon not being hired, Ms. Davis filed an EEOC charge alleging she was not hired because of her disability.[173] Also, Ms. Davis swore in a NLRB affidavit that she was not hired because of her FMLA leave, and testified at the hearing that was her current belief.[174]

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[165] J-2, ¶ 44

[166] T 252, 256 (Davis)

[167] T 440-441 (Brown); RX-5

[168] T 441 (Brown)

[169] T 484 (Brown); T 662 (Warren); RX-26 and 27

[170] T 497 (Brown); RX 35.

[171] T 665-666 (Warren); RX-34; T 496 (Brown)

[172] T 666 (Warren); RX-33; T 497 (Brown)

[173] T 443-444 (Brown); RX 6.

[174] T 255-256 (Davis)

iii. Gina Eads

It was stipulated by the parties that applicant Gina Eads was terminated from Ridgeview.[175] Ms. Eads admitted that she was terminated for not properly documenting a patient's medication,[176] and her Ridgeview discharge papers state she was not eligible for rehire.[177] Ms. Eads was aware of the no re-hire rule and was concerned that she would not be hired for that reason.[178] Ms. Holland, who interviewed Ms. Eads, noted contemporaneously with the interview that Ms. Eads stated she "learned from [the] past" and "would like a chance."[179] Because Ms. Eads was ineligible for re-hire at Ridgeview, Ms. Eads was not hired.[180] RHS applied the same no re-hire rule to non-Preferred applicants. For example, non-Preferred applicants Debra Pittman (LPN),[181] Latoya Tatum (CNA),[182] Arthur Thomas (CNA),[183] and Erin Sanford (Helping Hand)[184] were not hired because they were ineligible for re-hire at Ridgeview. Ms. Eads testified that she believes she was not hired by RHS because of the no re-hire rule.[185]

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[175] J-2, ¶ 45; T 187, 440-445, 537 (Brown).

[176] T 186 (Eads)

[177] T 178, 185 (Eads); RX-5

[178] 186-187 (Eads)

[179] T622-623, RX-8

[180] T 445 (Brown)

[181] T 484 (Brown); T 662 (Warren); RX-26 and 27

[182] T 497 (Brown); RX-35; T 496 (Brown); T 494 (Brown)

[183] T 665-666 (Warren); RX-34

[184] T 666 (Warren); RX-33

[185] T 186-187 (Eads)

iv. Charlotte Kimbrough

It was stipulated by the parties that applicant Charlotte Kimbrough was terminated from Ridgeview,[186] and her Ridgeview discharge papers state that she was not eligible for rehire because she was a voluntary quit, no-call/no-show.[187] Because she was ineligible for re-hire at Ridgeview, Ms. Kimbrough was not hired.[188] RHS applied the same no re-hire rule to non-Preferred applicants. For example, non-Preferred applicants Debra Pittman (LPN),[189] Latoya Tatum (CNA),[190] Arthur Thomas (CNA),[191] and Erin Sanford (Helping Hand)[192] were not hired because they were ineligible for re-hire at Ridgeview.

In addition, Ms. Warren who interviewed Ms. Kimbrough found that she was not professional in her interview; her attire was dirty, and she wore pajama shorts.[193] Ms. Warren took contemporaneous notes during the interview, and her notes are consistent with her testimony ("applicant's attire was dirty and she wore pajama shorts").[194] Ms. Warren believed that wearing pajamas to a professional job interview exhibited poor judgment.[195] Ms. Holland, who also interviewed Ms. Kimbrough, worried that "if someone is not going to keep themselves

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[186] J-2, ¶ 46

[187] T 467-468 (Brown)

[188] T 445 (Brown)

[189] T 484 (Brown); T 662 (Warren); RX-26 and 27

[190] T 497 (Brown); RX-35

[191] T 665-666 (Warren); RX-34; T 496 (Brown)

[192] T 666 (Warren); RX-33; T 494 (Brown)

[193] T 467-469 (Brown); T 626-627 (Holland); T 660 (Warren)

[194] T 659-660 (Warren); RX-13

[195] T 659 (Warren)

clean, how are they going to keep my residents clean?"[196] Both Ms. Holland and Ms. Warren recommended that Ms. Kimbrough not be hired.[197] Thus, even had Ms. Kimbrough been eligible for hire, she would not have been hired because of her interview attire.[198] Similarly, Ms. Warren recommended that non-Preferred applicant Debra Pittman not be hired because she was ineligible for re-hire and she was unkempt and dirty.[199] Ms. Kimbrough did not testify to refute RHS' legitimate, non-discriminatory reasons for not hiring her.

v. Connie Sickles

It was stipulated by the parties that applicant Connie Sickles was terminated from Ridgeview, [200] and her Ridgeview discharge papers state that she was not eligible for rehire because she was a voluntary quit, no-call/no-show.[201] Because Ms. Sickle was not eligible for re-hire at Ridgeview, Ms. Sickles was not hired.[202] RHS applied the same no re-hire rule to non-Preferred applicants. For example, non-Preferred applicants Debra Pittman (LPN),[203] Latoya Tatum (CNA),[204] Arthur Thomas (CNA),[205] and Erin Sanford (Helping Hand)[206] were not hired

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[196] T 626-627 (Holland)

[197] T 627 (Holland); T 660 (Warren)

[198] T 468-469 (Brown) (Ms. Brown also believed it was important for applicants to be presentable in their interviews since they would be working with residents and families)

[199] T 667 (Warren)

[200] J-2, ¶ 42

[201] RX-17

[202] T 472-473 (Brown); RX-17

[203] T 484 (Brown); T 662 (Warren); RX-26 and 27

[204] T 497 (Brown); RX-35

[205] T 665-666 (Warren); RX-34; T 496 (Brown)

[206] T 666 (Warren); RX-33; T 494 (Brown)

because they were ineligible for re-hire at Ridgeview. Ms. Sickles did not testify to refute RHS' legitimate, non-discriminatory for not hiring her.

vi. Paul Borden

Ms. Brown and Ms. Holland interviewed Paul Borden.[207] Ms. Holland testified that Mr. Borden was very defensive and aggressive, and he did not seem like he really wanted to be there or go through the process.[208] Ms. Brown testified that he was so defensive and aggressive in his interview, he scared her and made her feel uncomfortable.[209] Mr. Borden was defensive about answering the questions throughout the entire interview.[210] Ms. Holland took contemporaneous notes during the interview, and her notes are consistent with her testimony ("defensive, poor communication and aggressive throughout interview process").[211]

In addition, three of Paul Borden's co-workers had complained to Ms. Brown that they were "scared" of him.[212] Mr. Borden had used a power tool in their presence in an "aggressive" and disrespectful manner, and they did not feel comfortable working around him.[213]

Paul Borden also misrepresented his work history.[214] In the application's work history section, Borden admittedly failed to reveal a cleaning job he held at the time.[215] Honesty on

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[207] T 429 (Brown); 618 (Holland)

[208] T 618 (Holland)

[209] T 429-430, 528-529 (Brown)

[210] T 430 (Brown); T 618-619 (Brown)

[211] T 619-621; RX-1

[212]T 526-527 (Brown)

[213]T 526-527 (Brown)

[214]T 429 (Brown)

[215]T 224-225 (Borden); T 619 (Holland). The application required that the applicant list current employers. J-32; T 695 (Warren)

applications is important to RHS because the facility needs to be able to check with other employers for issues like abuse and because it wants honest, forthright individuals working with its residents.[216] For the above reasons, the decision was made not to hire Paul Borden.[217] Upon not being hired, Mr. Borden filed an EEOC charge alleging he was not hired because of his disability.[218] Mr. Borden's testimony did not refute the allegations or RHS' legitimate, non-discriminatory for not hiring him.[219]

Like Mr. Borden, non-Preferred applicants who exhibited poor attitudes and communication skills were not hired.[220] For example, former Ridgeview employee Stephen Campbell was not hired because Ms. Brown found Mr. Campbell to be "aloof" and not interested in the job.[221] Also, non-Preferred applicants were not hired for failing to list an employer on their application or other irregularities on their application.[222]

vii. Hope Kimbrell

Ms. Brown had a friend, Stacy Alley,[223] whose father was a resident of Ridgewood while it was operated by Preferred. Ms. Alley's father was very sick with cirrhosis of the liver, and

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[216] T 662 (Warren)

[217] T 429 (Brown); T 619 (Holland)

[218]T 431 (Brown); RX 2

[219] In fact, to the contrary, Mr. Borden admitted that his interview responses were cursory; for example, when Ms. Brown asked what changes he would make at the facility, he said "I told them nothing because everybody knew their job." Ms. Brown's primary concern was about the drug testing process (I was "concerned about the drug test."). T 223 (Borden).

[220] T 486 (Brown); RX 28

[221] T 485-486 (Brown)

[222] T 669-672 (Warren); RX 25, 31

[223] T 457, 569 (Brown)

she visited the facility often.[224] Ms. Alley testified that about "80 percent" of the time Ms. Kimbrell was not nice to her father, disrespectful to family members and acted "put-out" when they asked questions about their dying father's treatment.[225] Ms. Alley voiced her concerns about Ms. Kimbrell to Ms. Brown in approximately July, 2013.[226] She also told Ms. Brown, however, that, besides Ms. Kimbrell, her father had been well taken care of, and she complimented the work of Preferred employee Cindy Dudley (the union president).[227]

In addition to the complaint, in Ms. Kimbrell's interview she was negative and unfriendly, and gave short, curt answers.[228] Ms. Holland took contemporaneous notes during the interview, and her notes are consistent with her testimony ("very evasive, short, curt answers…aloof, cutting eyes…unprofessional").[229] Ms. Holland recommended that Ms. Brown not hire Ms. Kimbrell based on her interview.[230] For the above reasons, Ms. Brown made the decision not to hire Ms. Kimbrell.[231] However, she did hire Ms. Dudley (the union president), whom Stacy Alley complimented.[232] Preferred applicants who were friendly in their interviews,

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[224] T 609-610, 612 (Alley)

[225] T 609-613 (Alley); 445-45 (Brown). RHS has listened to the audio recording of the testimony and disputes the record transcription on 445:25-446:1. RHS contends that the transcription should read "And she voiced her concern that she wasn't a polite woman" not "white woman," which makes no sense under the circumstances. RHS respectfully requests that the ALJ require the court reporting service to correct the transcription.

[226] T 610-611 (Alley); T 445-446 (Brown)

[227] T 448 (Brown); T 610 (Alley)

[228] T 446 (Brown); T 624 (Holland); RX 10

[229] T 619-621; RX-9.

[230] T 624 (Holland).

[231] T 445-448 (Brown)

[232] T 448 (Brown).

such as Stephanie Eaton (CNA) and Peggy Ayers (LPN), were recommended for hire by the interviewers and offered jobs with RHS, but they did not accept them.[233]

viii. Teresa Diane McLain

During the interview process, three applicants, Lavetta Webster, Crystal Wilbert, and Lynda Baker, told Ms. Brown - when asked about how they got along with the other employees - that she should not hire Ms. McLain.[234] They reported that Ms. McLain harassed them, called Ms. Baker's grandchild "a bastard child," was hard to get along with, had a bad attitude and was "hateful."[235] Ms. Baker even began crying when discussing how Ms. McLain had bullied her.[236] Ms. Brown found it to be "heartbreaking" and could tell Ms. McLain's behavior had really affected Ms. Baker.[237] The ability to get along with and treat other employees with respect is important to RHS.[238] For the above reasons, Ms. Brown made the decision not to hire Ms. McLain.[239]

ix. Midge Lechey

Midge Lechey applied for the CNA position,[240] and was interviewed by Ms. Warren. Ms. Warren recommended that she not be hired because she did not have the required license for the position and because she made a misrepresentation on her application.[241] During her interview,

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[233] T 629-630 (Holland); T 73, 82 (Eaton)

[234]T 46-47 (Baker); T 532 (Brown); T 133 (Wilbert); T 663 (Warren)

[235]T 132-133 (Wilbert); T 532 (Brown).

[236]T 472 (Brown); T 627-628 (Holland).

[237] T 472 (Brown)

[238] T 663 (Warren)

[239] T 472 (Brown).

[240]T 693-694 (Warren); RX 14.

[241] T 661 (Warren)

Ms. Lechey admitted that she did not have the proper license to practice as a CNA in Alabama.[242] A CNA license is a state legal requirement to work as a CNA.[243] Ms. Warren took contemporaneous notes during the interview, and her notes are consistent with her testimony ("Does not have AL Certification").[244] RHS told Ms. Lechey that she would have to have an Alabama license for the job, but the company did not hear from her again, and to its knowledge, she never obtained an Alabama license.[245] Because Ms. Lechey was not licensed as an Alabama CNA, she was not hired as a CNA.[246]

Moreover, Ms. Lechey made a misrepresentation on her application because she did not list her current employer.[247] Honesty on applications is important to RHS because the facility needs to be able to check with other employers for issues like abuse and because it wants honest, forthright individuals working with its residents.[248] Thus, even had Ms. Lechey had the proper license, she would not have been hired because of her misrepresentation.[249] Ms. Lechey did not testify at the hearing to dispute any of the reasons asserted by RHS for not hiring her.

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[242]T 682 (Warren);

[243] T 660 (Warren).

[244] RX-14; T 661 (Warren)

[245] T 683 (Warren)

[246]T 683 (Warren); 471, 531 (Brown)

[247] T 661, 684-685 (Warren); RX-14. The application required that the applicant list current employers. JX-32; T 695 (Warren).

[248] T 662 (Warren)

[249] T 661 (Warren)

x. Marcus Waldrop

Marcus Waldrop did not begin work on October 1 because he had not completed his physical exam.[250] Mr. Waldrop was given an offer of employment contingent on completing a physical.[251] However, he did not complete his physical by October 1 because he "didn't have time."[252] **After October 1**, Mr. Waldrop called to report that he "missed the physical."[253] Mr. Waldrop did not think he would be allowed to reschedule his physical, but RHS allowed him to do so.[254] After he completed his physical exam, he was hired in the second week of October.[255] RHS applied the same criteria to non-Preferred applicants in making its hiring decisions and did not hire any employees who failed to show up for their physical or give advance notice.[256] Specifically, RHS did not hire non-Preferred applicant Connie Wood because she missed her physical.[257]

xi. Vegas Wilson

After Ms. Wilson's interview,[258] RHS' new Director of Nursing Sheila Cooper, who had previously worked with Ms. Wilson at another facility, told Ms. Brown that Ms. Wilson was terminated from the other facility for an altercation with a co-worker.[259] For this reason, Ms.

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[250] T 92-93 (Waldrop)

[251] T 476-477 (Brown); T 664 (Warren)

[252] T 92 (Waldrop)

[253] T 93-94 (Waldrop)

[254] T 93-94 (Waldrop)

[255] T 476 (Brown); RX-18

[256] T 664 (Warren); T 97 (Waldrop)

[257] T 492-493 (Brown); T 628-629 (Holland); RX-32

[258] T 533-534 (Brown)

[259] T 475, 533 (Brown)

Brown made the decision not to hire Ms. Wilson.[260] Similarly, RHS did not hire non-Preferred applicant Melissa Harrington based on Ms. Cooper's recommendation from her experience working with her.[261] Ms. Wilson did not testify to refute the reason for her discharge.

IV. ARGUMENT

The General Counsel failed to establish that Preferred employees constituted a majority of bargaining unit employees when RHS began operation or any time thereafter. The General Counsel also failed to establish that RHS refused to hire any Preferred employees to avoid bargaining with the union or that RHS reasons for not hiring the employees were false. Finally, the USW cannot insert a new argument, the "perfectly clear" successor argument into the proceedings when the argument was not alleged and contradicts the union's unfair labor practice charges, and, even if it could, the record evidence clearly establishes that the "perfectly clear" successor exception does not apply.

A. General Counsel Failed to Prove RHS Hired a Majority of Preferred Employees.

For a successor employer to have a duty to bargain with the union which represented its predecessor's employees, the predecessor's employees must constitute a majority of the bargaining unit of employees for the successor at the time a "substantial and representative complement" of employees is hired. Former Preferred employees did not constitute a majority of the bargaining unit on October 1, in November 2013 when a "substantial and representative complement" was hired, or at any time thereafter. Because the General Counsel has failed to establish discrimination in RHS hiring practices or in any of the individual applicant decisions, he has failed to establish that RHS was obligated to bargain with the USW. Therefore, the case should be dismissed.

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[260] T 475 (Brown)

[261] T 481 (Brown); RX 22-23.

1. To be obligated to bargain, a majority of the successor's employees must have been employed by the predecessor.

For a successor to be obligated to bargain with the predecessor's union, the successor must hire a majority of the bargaining unit employees. NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 281 (1972). The determination whether or not a successor has employed a majority of the predecessor's employees is made when the successor has hired a "substantial and representative complement" of its employees. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 47 (1987). In deciding when a "substantial and representative complement" exists, the Board examines a number of factors: "'whether the job classifications designated for operation were filled or substantially filled and whether the operation was in normal or substantially normal production.' In addition, it takes into consideration 'the size of the complement on that date and the time expected to elapse before a substantially larger complement would be at work . . . as well as the relative certainty of the employer's expected expansion.'" Id. (quoting Premium Foods, Inc. v. NLRB, 709 F.2d 623, 628 (9th Cir. 1983)).

2. Preferred employees did not constitute a majority.

Preferred employees did not constitute a majority of bargaining unit positions on October 1, 2013, in November 2014 when a "substantial and representative complement" of employees was reached, or at any time thereafter. "Helping Hands" must be counted because of their duties (which had been performed by CNAs) and the terms of the CBA between Preferred and the USW.

a. Helping Hands must be included in the bargaining unit.

Contrary to the General Counsel's argument for the exclusion of Helping Hands, Helping Hands must be included in the bargaining unit because (1) the collective bargaining agreement between Preferred and the USW specifically addressed that employees performing bargaining

unit work would be included in the bargaining unit regardless of position title changes, (2) the duties of the Helping Hands had been performed by bargaining unit employees under Preferred, and (3) Helping Hands were not excluded from the unit definition.[262]

First, the CBA between Preferred and the USW clearly establishes that Helping Hands, a new position title for the nurses' aide position would be included in the bargaining unit:[263]

> Pursuant to the certification of representative issued by the National Labor Relations Board on April 26, 1976, in Case No. 10-RC-10625, the Company agrees to recognize the Union as the exclusive representative of all full-time and regular part-time employees employed by the Company at its Jasper, Alabama facility including LPN's, nurse's aides, housekeeping employees, dietary employees, laundry employees, maintenance employees and the food supervisor **(it is understood that in the event any of the preceding job titles are changed they will remain in the bargaining unit)** but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The CBA expressly addresses a situation like this one where a job name change, as there was here, does not exclude individuals from the unit as long as the employees perform duties included in the unit. See Tarmac America, Inc., 342 N.L.R.B. 1049, 1050 (2004). In Tarmac, the Board found that a successor's new position which performed bargaining unit work could not be excluded from the bargaining unit. Id. The General Counsel alleges Helping Hands should not be included because they are (1) called something other than "aides" and (2) are not certified. The unit description does not observe either of these distinctions. General Counsel's argument that Helping Hands was not licensed and, therefore, should not be included in the bargaining unit

[262] No Preferred employees were denied employment because of the use of the Helping Hand position, so any argument by General Counsel that Helping Hands replaced Preferred employees would be incorrect. Furthermore, the number of Helping Hands decreased as time passed because some became CNAs (T 175 (D. Thomas), 314 (Dudley).

[263] JX-3, p. 4.

is not supported by the CBA, or the law.[264] The unit description did not require licenses for nurse's aides or other positions such as housekeeping, laundry, or maintenance. Preferred CNAs were included in the unit definition for nurse's aides although not specifically identified. Because Helping Hands are included in the bargaining unit under the terms of the CBA itself, they must be counted in assessing majority status.

Secondly, when new positions of a successor employer perform bargaining unit duties, the new positions must be considered part of the collective bargaining agreement. The duties of the positions, not the title, determine inclusion in the unit.[265] Here, the parties stipulated that Helping Hands performed work "which had been performed by the positions in Preferred's bargaining unit."[266] Consistent with her practice at Ridgeview, Ms. Brown divided the bargaining unit nursing aide duties between CNAs and Helping Hands.[267] Counsel even acknowledges that "employees in this [Helping Hands] classification would perform some of the same duties previously performed by the unit certified nursing assistants who worked for Preferred, such as cleaning closets and drawers, helping residents walk, transferring residents to different locations in the facility, picking up food trays, and distributing ice."[268] In addition to

[264] Contrast with Avanti Health Sys., LLC, 2011 NLRB LEXIS 715 (N.L.R.B. Dec. 12, 2011)(non-licensed nurses not included in the bargaining unit because bargaining unit was explicitly limited to licensed nurses)

[265] See Texaco Port Arthur Works Employees Fed. Credit Union, 315 NLRB 828, 834 (1994) ("The change in job duties was predominately a change in job title. The question of whether a job classification is included in the unit is based on the job content and not the job title."); Wiedemann Mach. Co., 118 NLRB 1616, 1618 (1957) (holding that inspectors were appropriately included in bargaining unit despite "change in their job titles" to quality control employees because "the duties of the quality control employees are basically the same now as when they were classified as inspectors").

[266] J-2, ¶ 35.

[267] CNA's perform certified nursing aide duties while Helping Hands non-certified duties.

[268] Brief in Support of Petition for Injunctive Relief, 14-MC-02075-SLC, doc. 2, p. 10.

General Counsel's stipulations, the undisputed testimony was that Helping Hands performed bargaining unit work.

Because the work performed by Helping Hands had always been performed by bargaining unit employees, this case is different from cases where the employer changed the historical bargaining unit by either adding positions with different duties or deleting positions which performed bargaining unit duties.[269] Here, the duties performed by Helping Hands were bargaining unit duties and remained so, even though the position title was modified. Because a change to a position title does not exclude a position performing bargaining unit work from the unit, the Helping Hands must be counted.

Finally, contrary to the General Counsel's position, the CBA unit description does not exclude Helping Hands from coverage. The unit description is broad, excluding only "office clerical employees, professional employees, guards, and supervisors." The Helping Hands position does not resemble any of these excluded positions. The unit includes all the non-supervisory, non-professional employees who worked in the patient areas of the facility. Helping Hands clearly fall within the coverage of this broad class. In fact, there can be no doubt that, had Preferred created the Helping Hands position, they would have been treated as part of the bargaining unit.[270]

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[269] For example, in Banknote Corp. of America, 315 N.L.R.B. 1041, 1043-44 (1994), the Board rejected the successor's attempt to combine historical bargaining units due to a switch in job duties of the unit positions because the "occasional or sporadic performance of duties across unit lines is insufficient to destroy the integrity of the Charging Party's units at the facility." In Avantis Health Sys., LLC, 357 N.L.R.B. No. 129, 2011 WL 6808000, *7 (NLRB 2011), the Board rejected the successor's exclusion of certain RNs from a unit in which the RNs had historically participated and were not excluded by the unit definition. Here, RHS did not seek to include positions performing duties outside the unit in the bargaining unit like Banknote or to exclude positions historically part of the unit like Avantis. Instead, RHS interpreted the unit based on the unit description and included the appropriate employees performing bargaining unit work.

[270] Banknote Corp., 315 NLRB at 1043 (the NLRB rejected the employer's attempt to avoid its bargaining obligation that the unit had changed because "the employees in the[] units continue[d] performing the same or substantially the same work as they had prior.").

For all of these reasons, the Helping Hands employees hired must be counted in determining majority status.

b. A substantial and representative complement did not exist prior to October 1, 2013.

Contrary to the USW's argument (T 333-34), the "substantial and representative complement" measure cannot be determined based on Preferred's inadequate pre-October 1, 2013 staffing practices. As the Fall River factors set forth, a "substantial and representative complement" is reached only when the employer's operation is in normal or substantially normal production, considering whether or not a significantly larger complement would be at work in a short time. 482 U.S. at 48-49.

The substantial and representative complement determination is made only after operation has begun. In Kessel Food Markets, the Board rejected the union's reference to the number of employees before the predecessor's stores closed in favor of the number of employees at the time the successor began normal operations and found that a majority of the workforce had not been hired. 287 NLRB 426, 454 (1987). Here, Ridgewood was not operating the facility prior to October 1, and therefore, a substantial and representative complement cannot have formed until October 1 at the earliest. See Fall River, 482 U.S. at 46-47 (quoting Burns, 406 U.S. at 278-29.

The substantial and representative complement is based on RHS, not Preferred's, employees and practices. It is undisputed that Preferred was losing employees and patients,[271] its remaining employees were working substantial overtime[272] and that it had sought to renegotiate its lease

[271] T 396-97 (Collett).

[272] T 170 (Thomas), 500-02 (Brown); 116 (Bollinger – short on CNAs); 98 (Waldrop – needed to hire more LPNs)

over a year before Ridgewood began operating the facility.[273] When RHS started on October 1, the facility was still short-staffed, schedules could only be made for 1 or 2 days at a time.[274] The facility also lacked adequate supplies. Under such circumstances, the dwindling number of employees Preferred utilized to finish out its lease is irrelevant to the analysis of RHS staffing practices which were designed to improve the operation and increase the patient census. T 504-05 (Brown). That RHS continued to hire employees after October 1, when it had already determined there was not a majority of Preferred employee, demonstrates its need for adding additional personnel after it commenced operating the facility.

Board law is clear that an ALJ errs by "second guessing" an employer's staffing decisions.[275] Framan Mechanical Inc., 343 N.L.R.B. 408 (N.L.R.B. 2004)(Board would not "substitute its own business judgment for that of the employer" and question the "economic efficacy of the Respondent's" staffing decisions). Ms. Brown is permitted to exercise her business judgment and not hire the minimum number of employees permissible under a state nursing regulation[276] or follow Preferred's failed business model, particularly when Preferred's own employees testified the facility was understaffed. Moreover, in July 2013, Preferred

[273] T 411-13 (Brown). Furthermore, neither the General Counsel nor the USW provided evidence of the number of bargaining employees prior to the time employees began departing in the summer of 2013. See CP 5 (identifies 91 employees as of July 31), but no evidence of the payroll number of bargaining unit employees before or after that date). Neither the USW nor the General Counsel provided evidence that Preferred's schedules included all bargaining unit employees, and the schedules included are incomplete and insufficient to identify the number of bargaining unit employees. For this reason as well, Preferred's staffing levels are irrelevant and not probative of a substantial and representative complement on or after October 1, 2013.

[274] T 116(Bolinger), T 589 (Brown); T 267, 306-07 (Dudley).

[275] Western States Envelope Co., 2010 NLRB LEXIS 79 (2010) citing Lamar Advertising of Hartford, 343 NLRB 261 (2004); Yellow Ambulance Service, 342 NLRB 804 (2004)("triers of fact should not substitute our judgment for that of an employer armed with its particular knowledge and experience in the relevant business endeavor or activity and faced with the vicissitudes and exigencies of business life.").

[276] The regulation relied upon by the USW requires only that the facility maintain adequate staffing. It does not require a certain number of employees. As Ms. Brown testified, meeting the minimum required by the state does not necessarily equate to a good business model designed to provide the resident care necessary for attracting business. (T 590 (Brown)).

employed 139 hourly employees (J-5), which is more than RHS employed when it began operations.

It is uncontroverted by any record evidence that Ms. Brown staffed RHS based on her "honest" belief about its appropriate staffing levels and the staffing ratio she was used to at Ridgeview. Ryder Distribution Resources, 311 NLRB 814, 816 (1993)(the "crucial factor" is whether the business reasons were "honestly invoked."). Ms. Brown had to turn around a failing facility, and staffed it appropriately based on her thirty years of experience in the industry and successful operations at Ridgeview. Thus, the Union's theory must be rejected. Framan Mechanical, Inc., 343 N.L.R.B. 408, 419 (N.L.R.B. 2004)(emphasis added)("the Board should not substitute its business judgment for that of the Respondent when it comes to decisions regarding the **staffing** of its projects and the personnel decisions that entails.").

c. Preferred employees were not a majority on October 1, 2013.

Although a substantial and representative complement had not yet been reached, Preferred employees did not even constitute a majority of the bargaining unit when RHS began operating the facility on October 1, 2013. The parties stipulated that RHS did not employ a majority of Preferred's employees performing bargaining unit work when it began operations. See Joint Stip. of Facts, ¶ 37 (49 out of 101).[277] On October 1, 2013, RHS had hired a total of 107 bargaining unit employees. Of those 107, only 51 were bargaining unit employees formerly employed by Preferred. Id. at 36.

Thus, if "majority status" is examined on October 1, the day RHS began operation, it had no duty to bargain. However, RHS was "short-staffed" on October 1, 2013, was scheduling two

[277] Counsel for the USW questioned some witnesses regarding employees who worked part-time for Ridgeview and Ridgewood after RHS began operating Ridgewood on October 1, 2013. Regular part-time employees are included in the bargaining unit description, and there is no evidence that these employees did not regularly perform part-time work for RHS after hire on October 1. Further, it is undisputed that, at the time of the hearing, some regular part-time employees continued to work for RHS at Ridgewood and for the Ridgeview facility. (T 672-73 (Warren)).

days at a time, and knew that it would hire a significant number of employees within the few weeks after October 1.[278] Therefore, RHS had not hired a "substantial and representative complement" of its workforce by October 1, 2013.

d. Preferred employees were not a majority when a "substantial and representative complement" was hired.

RHS reached "normal production" in November 2013, not when it began operations. Based on the Fall River Dyeing factors,[279] November 14, 2013 is the appropriate date for evaluating majority status, not October 1, because (1) the facility was "short-staffed" and not in substantially normal production when it began operations, (2) on October 1, expansion was imminent, and RHS knew it would hire a significant number of employees in the next several weeks, and, (3) in fact, RHS hired 22 additional employees (20% of the bargaining unit) in the next six weeks.

By October 1, the company was short-staffed and not staffed to provide patient care that Ms. Brown found adequate to her standards. Witnesses testified that the facility was short staffed when RHS began operations, employees were working excessive overtime, and that RHS was looking to hire additional LPNs and CNAs.[280] Because of changing staffing needs, scheduling was performed for only two days at a time. Ms. Brown testified that she needed more employees to staff the facility at acceptable levels and continued to hire until she reached a level more commensurate with Ridgeview staffing in November 2013. Using her *business judgment*, Ms. Brown hired consistent with her staffing levels at Ridgeview. Ridgeview's facility was

[278] T 116 (Bolinger); T 589 (Brown); T 267, 306-07 (Dudley).

[279] Factors the Board examines are whether the employer has substantially filled the unit job classifications designated for the operation, whether the operation was in substantially normal production, the size of the complement on the date of normal production, the time expected to elapse before a substantially larger complement would be at work, and the relative certainty of the expected expansion. Fall River Dyeing, 482 U.S. at 47-49.

[280] See T 170 (D. Thomas); 116 (Bolinger); 500-02, 589 (Brown).

licensed for 148 beds and employed around 200, non-supervisor/clerical employees; a ratio of **1 bed: 1.35 employees**. RHS was licensed for 98 beds and employed 107 bargaining unit employees; a ratio of **1 bed: 1.09 employees**.[281] Accordingly, RHS was *understaffed* by Ms. Brown's metric when it began operating on October 1.

Second, and most importantly, expansion was certain and RHS immediately began to hire additional employees. When an employer knows that a significant number of employees will be hired in the immediate time frame, the time for evaluating majority status is after those employees have been hired. See Myers Custom Prods., Inc., 278 N.L.R.B. 636, 637 (1986)("When a new employer expects, with reasonable certainty, to increase its employee complement substantially within a relatively short time, it is appropriate to delay determining the bargaining obligation for that short period."). Over the first six weeks after operations began, RHS hired twenty-two additional bargaining unit employees, none of whom were formerly employed by Preferred. The Board has consistently delayed the evaluation of majority status under similar circumstances.[282]

Lastly, RHS clearly had not substantially filled the unit job classifications by October 1, as it hired 20% more bargaining unit employees over the next six weeks. See Joint Stip. of Facts, ¶ 38. Thus, RHS did not reach normal production until November 2013, and by that time RHS employed a total of 129 bargaining unit employees. Of those 129, only 51 were bargaining unit employees formerly employed by Preferred.

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[281] If the patient census was 75 beds occupied, RHS' occupied bed to employee ratio was 1 bed:1.43 employees, substantially similar to Ridgeview's.

[282] See Myers, 278 N.L.R.B. at 637; see e.g., Premium Foods, Inc., 260 N.L.R.B. 708 (1982) ("normal production" determined after employer hired three new employees (from a total of five to eight) in first three weeks).

Because RHS did not employ a majority of former-Preferred employees at the time normal production and a "substantial and representative complement" was reached, RHS had no duty to bargain with the union.

3. The General Counsel has failed to establish discrimination in hiring.

a. The General Counsel failed to demonstrate a discriminatory scheme.

The General Counsel has failed to provide any evidence of an alleged discriminatory hiring scheme to avoid hiring a majority. While a new employer is under no obligation to hire a predecessor's employees, it cannot refuse to hire predecessor employees to avoid a bargaining obligation. Fall River, 482 U.S. at 40; Burns, 406 U.S. at 280-81. Here, in contrast to the complete lack of evidence of a discriminatory scheme, the evidence establishes uniform application of neutral hiring criteria, a preferential application timetable for Preferred employees, the hire of nearly 80% of Preferred applicants who applied,[283] and a resulting significantly higher percentage of Preferred employees hired than non-Preferred employees. The evidence establishes that RHS utilized the neutral hiring practices already in place at Ridgeview, and applied the same application process and criteria to applicants employed by Preferred and those not employed by Preferred. RHS provided a three-week window for Preferred employees to apply and interview prior to accepting any other applicants. RHS hired nearly 80% of Preferred employees who applied, a much higher percentage than outside applicants. Furthermore, RHS offered employment to at least four additional Preferred employees, two who refused the offer and two who did not show up to work on October 1, which shows that it was applying neutral criteria and not seeking to avoid hiring a majority of Preferred employees. The General Counsel has failed to demonstrate a discriminatory scheme.

[283] Compare Stipulated Facts, ¶ ¶ 34-35 (78.4% (51 of 65 applicants)) to Kessel Food Markets, 287 NLRB 426, 454 (1987) (no evidence of discrimination even though only 50.5% of predecessor's applicants were hired).

b. The General Counsel failed to establish discrimination in hiring decisions.

To establish a Section 8(a)(3) violation by a successor, the General Counsel must proffer direct or circumstantial evidence that union affiliation motivated the new employer's decision not to hire the predecessor's employees. Planned Bldg. Servs., 347 N.L.R.B. 670 (N.L.R.B. 2006); NLRB v. Wright Line a Div. of Wright Line, Inc., 251 NLRB 1083 (1980), enforced, 662 F.2d 899, 901-02 (1st Cir. 1981). If the General Counsel meets its *prima facie* burden, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the applicant's union affiliation. Id. Here, General Counsel cannot make out a *prima* facie case, and, regardless, RHS met its burden to justify all hiring decisions and actions.

i. The General Counsel has not established a prima facie case.

The General Counsel failed to satisfy his *prima facie* case and, thus, his claims fail as a matter of law.[284] The record contains no evidence that employees' union representation was a motivating factor in its hiring decisions. Likewise, the General Counsel cannot establish animus. For these reasons, the General Counsel failed to demonstrate that the employees' union affiliation was a motivating factor in the hiring decisions, and thus, their claims must be dismissed.

First, the General Counsel has failed to show that RHS considered applicants' union representation in its hiring decisions. The evidence overwhelmingly establishes otherwise. Every applicant allegedly known to be members of the union – Cynthia Dudley (president), Stephanie Eaton (volunteered at interview), Crystal Wilbert (volunteered at interview), Marcus Waldrop (volunteered at interview), Audrey Borden (allegedly asked at interview), and Becky

[284] Under Planned Building Services, 347 NLRB 670, 673 (2006), the factors to be considered in determining an employer's motive regarding hiring include "expressions of union animus; absence of a convincing rationale for failure to hire the predecessor's employees, inconsistent hiring practices or overt acts or conduct demonstrating a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its hiring in a discriminatory manner."

Ramos (volunteered at interview) – was offered employment which is wholly inconsistent with the notion that RHS discriminated. Shell Elec., 325 NLRB 839, 842 (1998)(finding no evidence of anti-union animus where Respondent had hired a number of union members). Moreover, RHS gave all Preferred employees (covered by the collective bargaining) a special three week preference in hiring, uniformly utilized neutral hiring criteria (already in place at Ridgeview) in hiring decisions for Preferred and non-Preferred employees, hired 80% of Preferred's applicants, hired a far greater percentage of Preferred applicants than non-Preferred applicants; and Ms. Brown even testified that she "wanted" to hire a "majority" of Preferred's employees.[285] *Hardly* the behavior of someone implementing a scheme **not** to hire Preferred employees. Lastly, Ms. Brown had a long, "great" relationship with the union at Ridgeview ("we had [a union] at Ridgeview and [it] had worked great for many years") and anticipated a similar strong relationship with the USW at RHS, telling the USW (and employees) that she looked forward to working with the union.[286] E & I Specialists, Inc. & Int'l Bhd. of Elec. Workers, Local 343, 349 NLRB 446, 449 (2007)(statement by hiring manager that he did not "have any problem hiring union guys" and that he had "worked with a lot of union guys … so that has nothing to do with anything" established no anti-union animus). In fact, after the NLRB claimed Preferred employees represented a majority of the bargaining unit, Ms. Brown even *offered to let the USW have an election at the facility.*

Secondly, the General Counsel has not established union animus. An essential element of any discrimination case arising under the NLRA is proof that the employer made its decision because of anti-union animus.[287] The Board requires "substantial" direct or circumstantial

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[285] T 415-416 (Brown).

[286] J-4.

[287] See e.g., NLRB v. Alan Motor Lines, Inc. 937 F.2d 887, 891 (3d Cir. 1991).

evidence demonstrating the employer's knowledge of, and hostility to, an applicant's protected activity. Wright Line Inc., 251 N.L.R.B. 1083 (1980)(must show union animus was a "substantial" or "motivating" factor in actions taken). Mere "speculation" or "conjuecture" that union animus motivated a hiring decision is not enough. Amcast Automotive of Indiana, Inc., 348 NLRB 836, 839 (2006)(animus must "rest on something more than speculation and conjecture."). Here, the General Counsel has not met his burden to show anti-union animus, let alone that Ms. Brown orchestrated a complicated discriminatory hiring scheme.

Out of 180 applications received by the company, General Counsel's "animus" evidence consists primarily of *allegations* that four employees were interrogated - Ms. Brown allegedly asked Paul Borden and his wife Audrey Borden if they were in a union, Kara Holland allegedly asked Stephanie Eaton and Pam McPherson if they were part of the union, and some employees were asked questions about their benefits. Ms. Brown and Ms. Holland categorically deny the allegations they interrogated any employees, and it is telling that **none** of General Counsel's other witnesses testified they were asked the same questions. Further, General Counsel's witnesses were not credible. Mr. Borden's claim that he sat down in his interview and the *first* question he was asked was, "are you in a union?" is not believable. Audrey Borden is Mr. Borden's wife, and their testimony is suspiciously exactly the same. Ms. Eaton failed to disclose that she was asked about the union in her Board affidavit. Ms. McPherson was an office employee who was not in the bargaining unit. Even more importantly, Ms. Eaton and Ms. Borden are the only witnesses of the four who answered that they were in the union and *both were offered employment*. Lastly, some employees were asked about their paycheck deductions only because the company was still trying to determine what benefits to offer, not because of union animus. The applicants that allegedly disclosed that they had union dues deducted from their checks were also hired.

General Counsel's other evidence is that Ms. Brown made three *alleged* antiunion statements:[288] (1) in August that she "didn't see that [employees] needed a union,"[289] (2) in October that there was not a union at the facility, and that, (3) in response to a question in 2014 about whether the facility could close if unionized., she allegedly answered (according to only one witness) that it was a possibility. The first was a lawful statement under Section 8(c) of the NLRA[290] and is not evidence of anti-union animus. BE & K Construction Co. v. NLRB, 133 F.3d 1372 (11th Cir. 1997)("a finding of unlawful motivation cannot be based solely on the anti-union stance of an employer."); Holo-Krome Co. v. NLRB, 907 F.2d 1343, 1347 (2d Cir. 1990)(In adopting § 8(c), "Congress chose to prevent chilling lawful employer speech by preventing the Board from using anti-union statements, not independently prohibited by the Act, as evidence of unlawful motivation.").

The second was a factual statement made after the hiring decisions and is not evidence of animus; by October 1, it was clear that RHS had not hired a majority of Preferred employees and did not have to recognize the union. P.S. Elliott Services, 300 NLRB 1161, 1162 (1990)(dismissing an 8(a)(1) allegation when a potential successor employer's representative, in response to a question from a predecessor's employee, stated that the employer was a "non-union

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[288] Ms. Brown's October 22, 2013 letter (J-17) which explaining the Company's lawful position on union representation and stating "[i]t is your choice whether to sign a card" is not evidence of animus. First, it was not provided to employees until weeks after it became clear that the USW did not represent a majority of employees. Second, the letter was a lawful statement under 29 U.S.C. § 158(c), and is not evidence of union animus. See e.g., BE & K Construction Co. v. NLRB, 133 F.3d 1372 (11th Cir. 1997). The USW did not file a charge alleging the letter violated § 8(a)(1).

[289] Ms. Brown denied that she made this comment in August. Even the General Counsel's witnesses provided divergent testimony on whether she made this statement or instead made a statement about how well she worked with the union at Ridgeview.

[290] Section 8(c) of the statute provides as follows:

> The expressing of any views, argument, or opinion, or the dissemination thereof ... shall not be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

company."); Power Servs. Co., 2006 NLRB LEXIS 92 (N.L.R.B. Mar. 17, 2006)(refusing to infer unlawful animus from "accurate communications"). Ms. Brown explained to the employees that the reason there was not a union was there were not enough former Preferred employees.[291]

The third is simply not true. It was categorically denied by Ms. Brown, not in the alleging employee's "Board affidavit," and not corroborated by any other witnesses' testimony and, regardless, it allegedly occurred months after the hiring decision. See Caribe Ford, 348 N.L.R.B. 1108, 1109 (2006)("the evidence does not establish antiunion animus as of that time. At most, the evidence shows such animus in March, 2 months after the discharge...To hold otherwise is to pile inference on top of inference."). General Counsel identifies no other relevant expressions of anti-union animus.[292] His evidence is clearly not "substantial" and therefore, he has not met his burden.

Simply put, General Counsel has not met his burden. No evidence exists, let alone "substantial" evidence, that Ms. Brown concocted a discriminatory plan based on anti-union animus. To the contrary, the substantial evidence is that Ms. Brown was not motivated by anti-union animus.

ii. The General Counsel has failed to show that RHS legitimate, non-discriminatory reasons for not hiring certain employees are false.

Because the General Counsel failed to proffer substantial evidence of anti-union animus, his claims fail as a matter of law.[293] However, even assuming *arguendo* that the burden shifted

[291] T 314 (Dudley).

[292] To the extent that the USW argues that DON Sheila Cooper expressed any anti-union animus, the record is clear that Ms. Cooper had no part in the hiring decisions at issue. T (109-112).

[293] See, e.g., Wolf Street Supermarkets, Inc., 264 N.L.R.B. No. 150 (1982), slip op. at 3 n.2, ALJD at 16 (General Counsel did not establish prima facie case of discriminatory refusal to rehire by adducing proof that employer failed to interview apparently qualified applicants from a shop that the employer knew to be unionized, while

to RHS, the General Counsel cannot show that RHS' reasons for not hiring the challenged applicants were discriminatory.

In refusal to hire cases, the Board has stated that consistent enforcement of neutral hiring policies does not violate the Act. Zurn/N.E.P.C.O., 345 N.L.R.B. 12, 15 (N.L.R.B. 2005)("Board has recognized, as a valid defense to an allegation of anti-union discrimination in hiring, an employer's reliance upon a neutral hiring policy"). Here, the General Counsel does not even allege that RHS applied its hiring policies inconsistently (out of the 180 applications received), and no evidence of inconsistent application exists. Rather, the General Counsel attacks the wisdom or correctness of RHS' hiring decisions.[294] However, this attack is misplaced. Second-guessing RHS' selection decisions does not rebut the legitimacy of RHS' reasons. The ALJ may not substitute his business judgment for that of the employer and decide what he thinks the employer *should have done*. "Management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision."[295] Just as importantly, General Counsel offers zero evidence that RHS would have hired the applicants in the absence of his or her union activity or affiliation.

(A) RHS Consistently Excluded Applicants Not Eligible for Rehire at Ridgeview.

In its hiring decisions, RHS did not consider applicants who were classified as "not eligible for hire" at Ridgeview, Ms. Brown's other nursing facility. Applicants' references were checked after each applicant's interview and drug test (and sometimes physical (T 653 (Warren).

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simultaneously interviewing other candidates, in absence of showing of union animus or other unlawful reason for the discriminatory conduct).

[294]For example, that RHS should have hired employees not eligible for rehire at Ridgewood, should have hired an employee not licensed to perform the work required, or hired an employee who it had received complaints about.

[295]Sam's Club, 349 N.L.R.B. 1007, 1009 (2007)(citation omitted)("management is for management. Neither Board not Court can second-guess it or give it gentle guidance by over-the-shoulder supervision.")

By definition, RHS' no-rehire policy was a legitimate, non-discriminatory reason for making hiring decisions. Raytheon Co. v. Hernandez, 540 U.S. 44 (U.S. 2003)("a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason" to reject a candidate).

General Counsel counters that Gina Harrison claims Kara Holland told her in her interview that she was eligible for rehire,[296] and that Ms. Brown told Ms. Kimbrell, in an August small group meeting, that individuals fired from Ridgeview would be "considered."[297] With regard to Ms. Harrison's allegation, Ms. Holland denies saying anything like this,[298] and, further, Ms. Brown made the ultimate hiring decisions.[299] With regard to Ms. Kimbrell, Ms. Brown denies the allegation, and neither Ms. Eaton (who was allegedly present in the meeting) nor any other witnesses corroborated Ms. Kimbrell's account. More importantly the evidence proves nothing. It does not show discriminatory application or animus, and clearly no sinister motive existed because RHS did not hire both non-Preferred and Preferred applicants under the rehire rule.[300]

(B) Lacee Cox Was Not Eligible For Hire and Was Rude in Her Interview.

The parties stipulated that applicant Ms. Cox was ineligible for rehire at Ridgeview, and her Ridgeview discharge papers state that she was not eligible for rehire because of unsatisfactory work. Because Ms. Cox was ineligible for rehire at Ridgeview, she was ineligible for hire at RHS and not selected. The undisputed evidence establishes that RHS applied the no rehire rule consistently, without exception, during the hiring process to both Preferred and non-

[296] T 181 (Harrison).

[297] T 58-59 (Kimbrell).

[298] T 621-622 (Holland).

[299] T 445 (Brown).

[300] See also, Zurn/N.E.P.C.O., 345 NLRB 12 (2005)(no inference of animus was warranted because the employer had abided by its hiring policy in "the great majority of instances.").

Preferred applicants. For example, RHS did not hire non-Preferred applicants Debra Pittman, Arthur Thomas, Erin Sanford, and Latoya Tatum because they were ineligible for rehire at Ridgeview.

Further, in addition to not being eligible for rehire, during her interview, Ms. Cox was unfriendly, did not smile and acted like she did not want to be there. Ms. Holland's interview notes confirm this. *Ms. Cox did not testify to refute the allegations*, and an adverse inference should be drawn. Martin Luther King, Sr., Nursing Center, 231 NLRB 15, fn. 1, (1977) ("where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him."). No evidence exists that any non-Preferred applicants who were unfriendly in their interview were hired. Also, Preferred employees like Stephanie Eaton and Peggy Ayers who were friendly in their interview were offered a job.[301] Thus, even had Ms. Cox been eligible for rehire, she would not have been hired because of the separate, independent reason that her interview was not satisfactory.

(C) Betty Davis Was Not Eligible for Hire

Ms. Davis testified that she believed that she was not hired because of her FMLA leave, and filed an EEOC charge alleging she was not hired because of her disability. While her allegations are not true, it is apparent not even Ms. Davis believes she was discriminated against as part of an unlawful hiring scheme. Further, the Parties stipulated that Ms. Davis was ineligible for rehire at Ridgeview. Ms. Davis admitted in her testimony that she was terminated from Ridgeview, and her Ridgeview discharge papers specifically state she was not eligible for

[301] T 629-30 (Holland); T 73, 82 (Eaton).

rehire. Because Ms. Davis was ineligible for rehire at Ridgeview, Ms. Davis was not hired. RHS applied the no rehire rule consistently to Preferred and non-Preferred applicants, without exception, during the hiring process.

(D) Gina (Eads) Harrison Was Not Eligible For Hire.

The Parties stipulated that applicant Gina Eads was ineligible for rehire at Ridgeview; Ms. Eads admitted that she was terminated for not properly documenting patient's medicine; and her Ridgeview discharge papers specifically state she was not eligible for rehire. Further, Ms. Eads was aware of a no-rehire rule, and believed the rule was the reason she was not hired. Because Ms. Eads was ineligible for rehire at Ridgeview, Ms. Eads was not hired. RHS applied the no rehire rule consistently, without exception, during the hiring process.

The General Counsel appears to argue that the no rehire rule was not the reason Ms. Eads was not hired because she was sent for a physical. This argument is nonsense. As Ms. Warren and Ms. Brown, explained, the hiring process was a busy time. Because physicals were scheduled soon after the interview (in Ms. Eads case about 2 days), it is easy to believe that Ms. Warren who was checking rehire status at Ridgeview did not know Ms. Eads status when she went for a physical. In any event, the fact that Ms. Eads took a physical in no way refutes that RHS applied the no-rehire rule to her and the other applicants consistently.

(E) Charlotte Kimbrough Was Not Eligible for Hire and Wore Pajamas To Her Interview

The Parties stipulated that applicant Charlotte Kimbrough was ineligible for rehire at Ridgeview, and her Ridgeview discharge papers state that she was not eligible for rehire because she was a voluntary quit for no-call/no-show. Because she was ineligible for rehire at Ridgeview, Ms. Kimbrough was not hired. RHS applied the no rehire rule consistently, without exception, during the hiring process.

In addition to not being eligible for rehire, Ms. Kimbrough was also not hired for a separate, independent reason. Ms. Kimbrough was not professional in her interview; her attire was dirty, and she wore pajama shorts. Ms. Warren's notes from the interview confirm this. *Ms. Kimbrough did not testify to refute the allegations*, and an adverse inference should be drawn. Martin Luther King, Sr., Nursing Center, 231 NLRB 15, fn. 1, (1977). There is no evidence that any non-Preferred applicants who wore dirty clothes and pajamas to the interview were hired. For example, like Ms. Kimbrough, non-Preferred applicant Debra Pittman, was unkempt and dirty, and therefore was not hired. Thus, even had Ms. Kimbrough been eligible for rehire, she would not have been hired because of her interview attire.

(F) Connie Sickles Was Not Eligible for Hire

It was stipulated that applicant Connie Sickles was ineligible for rehire at Ridgeview, and her Ridgeview discharge papers state that she was not eligible for rehire because she was a voluntary quit for no-call/no-show. Because Ms. Sickles was not eligible for rehire at Ridgeview, Ms. Sickles was not hired. RHS applied the no rehire rule consistently, without exception, during the hiring process. *Ms. Sickles did not testify to refute the allegations*, and an adverse inference should be drawn. Martin Luther King, Sr., Nursing Center, 231 NLRB 15, fn. 1, (1977).

(G) Paul Borden Scared Co-Workers, Was Aggressive and Misrepresented His Work Experience

The General Counsel contends that RHS was forbidden from refusing to hire an applicant whom three employees reported they were "scared" of, was aggressive, exhibited poor communication skills in his interview, and, admittedly, made misrepresentations on his application. The General Counsel is wrong.

Three employees complained to Ms. Brown that Mr. Borden's behavior "scared" them and that he was aggressive. Ms. Brown and Ms. Holland testified that Mr. Borden was also aggressive in his interview, stating that his responses were short and he was defensive. Ms. Holland's notes taken during the interview confirm Mr. Borden's behavior. (R-1). Mr. Borden tried to excuse his rudeness by claiming he was upset that the door had been open during his drug test. (T 223). There is no evidence that Mr. Borden was treated any differently than other applicants in regard to the drug test.[302] Mr. Borden's testimony did not address that he scared co-workers, refute his demeanor in the interview[303] or adequately explain why he lied on his application. In fact, his theory is that he was not hired because of his disability (EEOC Charge), not as part of unlawful hiring scheme. The decision to not hire Mr. Borden was not discriminatory, and clearly the NLRA does not require that an employer hire an applicant who the company believes scares other co-workers and acts aggressively. No evidence exists that RHS hired applicants who scared the interviewers or co-workers (let alone both).

Further, Mr. Borden admitted that he misrepresented his work experience on his application. He explained at the hearing that he "didn't feel like it was a second, really, a second job" that he needed to list on his application. Regardless of what he "felt", this was a misrepresentation, and RHS was well within its rights to exercise its business judgment to not hire an applicant who made a misrepresentation about his work history. Iplli, Inc., 321 NLRB 463, 466 (1996) (termination upheld where employee falsified his application and was

[302] T 688 (Warren).

[303] In fact, to the contrary, Mr. Borden admitted that his interview responses were cursory; for example, when Ms. Brown asked what changes he would make at the facility, he said "I told them nothing because everybody knew their job." Ms. Brown's primary concern was about the drug testing process (I was "concerned about the drug test."). (T 223 (Borden)).

incompetent); First Transit, Inc., 350 NLRB 825 (2007)(The Board limited back pay due to the point the employer discovered that the employee had falsified her employment application).

(H) Hope Kimbrell Was Rude to a Patient and His Family and Had a Negative Attitude in Her Interview

The General Counsel contends that RHS was forbidden from refusing to hire an applicant who was rude and abrasive to a dying man's family, and was disrespectful in her interview. Again, the General Counsel is wrong. RHS did not hire any applicants who were rude to patient's family members or interviewed poorly (let alone who did both). Ms. Alley testified that about "80 percent" of the time Ms. Kimbrell was abrasive to her and other family members and acted put-out when they asked questions about her dying father's treatment, and she complained about this to Ms. Brown.

In addition to the complaint, in Ms. Kimbrell's interview she was negative and unfriendly, and gave short, curt answers. She "cut" her eyes at her interviewer. Holland's interview notes confirm this. (R-9). Ms. Kimbrell did not refute (or even address) how she treated the patient or his family, or her demeanor in her interview. For the above reasons, Ms. Kimbrell was not hired. However, Ms. Alley complimented the care her father had received from Preferred employee Cindy Dudley (the union president), and *Ms. Brown hired Ms. Dudley.* Clearly RHS did not discriminate against Ms. Kimbrell.

(I) Midge Lechey Was Not Licensed To Work as a CNA in Alabama and Made a Misrepresentation on Her Application

The General Counsel contends that RHS should have hired an applicant who was not licensed for the position for which she applied. An Alabama CNA must have an Alabama license and Ms. Lechey did not have one. *Ms. Lechey did not testify to refute the allegations,* and an adverse inference should be drawn. Martin Luther King, Sr., Nursing Center, 231 NLRB 15, fn. 1, (1977). Because she was not eligible for hire pursuant to RHS' objective, non-discriminatory

policy against hiring individuals not licensed for the position applied for, she was not selected. NLRB v. Fluor Daniel, 161 F.3d 953 (6th Cir. 1998) (employer may lawfully reject an applicant who is unqualified). No applicants without the proper licensing were hired. Further, RHS was clearly not required to wait until Ms. Lechey received the proper licensing. Jacobs Heating & Air Conditioning, 341 N.L.R.B. 981, 986 (N.L.R.B. 2004) "[t]he fact that the license may have been easy to obtain...did not require Respondent to waive its requirement and permit the two Union representatives additional time to become eligible.").[304] If Ms. Lechey did ever obtain the proper license, she never informed RHS or re-applied for employment. Neither was RHS obligated to consider her for a job which she did not apply. There is a significant pay difference between CNAs and Helping Hands, and there is no evidence that Ms. Lechey was interested in a Helping Hand position. RHS did not ask other applicants if they were interested in other positions. (T 693-94 (Warren)).

Moreover, Ms. Lechey made a misrepresentation on her application because she did not list her current employer. Thus, even had Ms. Lechey had the proper license, she would not have been hired because of her misrepresentation. Iplli, Inc., 321 NLRB 463, 466 (1996) (termination upheld where employee falsified his application and was incompetent).

(J) Three Applicants Complained That Diane McLain Was a Bully and Hateful.

The General Counsel contends that RHS was forbidden from refusing to hire an applicant who three co-workers complained was a bully and hateful. During the interview process, three applicants, Lavetta Webster, Crystal Wilbert, and Lynda Baker, told Ms. Brown - when asked how they got along with other employees - that she should not hire Ms. McLain. One employee began crying, and the others relayed stories about her bullying behavior, such as calling an

[304] At the time of the hiring process, Ms. Warren was unaware of the process by which Ms. Lechey would obtain her Alabama license. (T 682 (Warren)).

employee's granddaughter a "bastard" child. According to Ms. Brown, it was "heartbreaking." It is not alleged that RHS hired any employees who had been accused of being a bully and hateful. Clearly the decision to hire an employee accused of such deplorable behavior should be left to RHS' business judgment.

(K) Marcus Waldrop Skipped His Physical but Was Hired After It Was Completed.

Marcus Waldrop did not begin work on October 1, 2013, because he had not completed his physical exam. Mr. Waldrop knew he had to complete a physical, but, he did not do so because he "didn't have the time." **After October 1**, Mr. Waldrop called to report that he "missed the physical." Mr. Waldrop did not think he would be allowed to reschedule his physical, but RHS allowed him to do so. After he completed his physical exam, he was hired. RHS applied the same criteria to non-Preferred applicants in making its hiring decisions and did not hire any employees who failed to show up for their physical or give advance notice. Specifically, RHS did not hire non-Preferred applicant Connie Wood because she missed her physical.

(L) Vegas Wilson Had Been Terminated From Another Job For an Altercation With a Co-Worker.

The General Counsel contends that RHS should have hired an applicant who had been fired from her previous job for physical violence with another co-worker. Ms. Wilson was not hired because the new RHS Director of Nursing reported that Ms. Wilson had been terminated from another facility for an altercation with another employee. *Ms. Wilson did not testify to refute the allegations*, and an adverse inference should be drawn. Martin Luther King, Sr., Nursing Center, 231 NLRB 15, fn. 1, (1977). RHS did not hire non-Preferred applicant Melissa Harrington based on the Director of Nursing's recommendation from her experience working

with her. Clearly RHS was within its rights to exercise its business judgment and not hire an applicant who had a history of confrontational behavior.

General Counsel points to the fact that Ms. Wilson took a physical. Again, that fact is of no consequence because Ms. Brown decided not to hire Ms. Wilson when she learned of the altercation from Ms. Cooper.[305]

B. The Union's New Theory Fails as a Matter of Law.

In addition to General Counsel's theories, the Union argues RHS was a "perfectly clear" successor. However, the "perfectly clear successor" doctrine does not apply. Furthermore, the union cannot inject new theories into the case.

1. The union cannot inject a new theory into the case.

"[I]t is well established that the General Counsel's theory of the case is controlling, and that a charging party cannot enlarge upon or change the General Counsel's theory." Zurn/N.E.P.C.O., 329 NLRB 484, 484 (1999). The union's "perfectly clear" successor theory was not mentioned in the USW's seven unfair labor practice charges,[306] addressed (nor asked to be addressed) in RHS' position statements, raised in the underlying Complaint[307] (and no amendments at hearing were made), or argued in General Counsel's 10(j) Petition or Brief in Support submitted to the Northern District of Alabama on November 24, 2014.[308] Rather, this

[305] Interestingly, Ms. Wilson did not pass her physical which would have precluded her from employment with RHS anyway. (CP 7).

[306] GC-1.

[307] The Complaint alleges § 8(a)(1) interference with union activities (interrogation), discrimination in hiring, and a § 8(a)(1) and § 8(a)(5) violation for "failing and refusing to **bargain** collectively" *since* October 1, 2013, with the union over "mandatory subjects" of bargaining. (Complaint, ¶¶11, 14-15, 21-27). It does not allege any conduct that would make RHS a perfectly clear successor, or that RHS overstaffed its facility.

[308] See Memo. of Law in Support of Petition for 10(j) Relief, 14-mc-02075-SLB, doc. 2.

theory was injected into the proceedings by the union at the close of General Counsel's case.[309] ATS Acquisition Corp., Inc., 321 N.L.R.B. 712 (N.L.R.B. 1996)(union prohibited from injection "perfectly clear" successor theory into Burns successor case). It is well-settled that a charging party cannot enlarge upon or change the General Counsel's theory of the complaint and the Union's new theory must be rejected. Kimtruss Corp., 305 NLRB 710, 711 (1991) (The charging party cannot enlarge upon or change the General Counsel's theory of the case). Furthermore, the USW cannot now assert the "perfectly clear" successor exception after its unfair labor practice charges filed prior to RHS commencing operations alleged that RHS and RHCC repudiated the collective bargaining agreement, notified Preferred employees that employment with RHS would be under new terms and conditions, and announced changes to benefits and other terms and conditions.[310]

2. RHS was not a "perfectly clear" successor.

Even if the ALJ considers the union's "perfectly clear" theory, it is meritless. The union's "perfectly clear" theory (or Spruce Up theory) must fail because (1) RHS did not hire a majority of Preferred employees, and, thus, the "perfectly clear" doctrine does not apply, and (2) RHS did not mislead employees into believing all would be retained with no changes and clearly announced its intent to set new terms and conditions prior to offering employment.

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[309] T 331-333.

[310] In Re Kamal Corp., 354 NLRB 190, 191-92 (2009) (holding that ALJ erred in failing to dismiss complaint where General Counsel alleged unfair labor practice theory not raised in charge; "The complaint—by alleging failure to apply the collective-bargaining agreement to nonmembers—alleged discrimination against nonmembers. Conversely, the charge—by alleging retaliation against employees for engaging in union activity—alleged discrimination against union supporters. Thus, as correctly explained by the judge, the complaint allegation is "the reverse" of the charge allegation.").

a. The "perfectly clear" successor analysis does not apply because RHS did not hire a majority of Preferred employees.

RHS cannot be a "perfectly clear" successor because it did not employ a majority of Preferred employees, and therefore, had no duty to bargain. Under the National Labor Relations Act, the successorship inquiry has two steps. First, as discussed above, the Board must determine that the new employer hired a "substantial and representative complement" of the predecessor's workforce and that there is substantial continuity between the predecessor and purchaser's operations (referred to as a Burns Successor). If so, the employer has a duty to recognize the union. If not, the analysis ends. Only after a determination that the employer is a successor obligated to recognize the union is the determination reached whether or not the "perfectly clear" successor exception applies to the ordinary rule that a successor is "'free to set initial terms on which it will hire employees of a predecessor.'"[311]

As discussed above, Preferred employees did not constitute a majority of the bargaining unit when RHS began operations or at any time thereafter. Thus, RHS had no obligation to recognize the union, and doing so would constitute a violation of § 8(a)(2).[312] The "successor" and recognition questions must be addressed before the "perfectly clear" exception can be analyzed. [313] The union's argument places the cart before the horse. Because the undisputed

[311] Spruce Up Corp., 209 N.L.R.B. 194, 195 (1974) (quoting Burns, 406 U.S. at 294-95 (distinguishing ordinary rule from "instances in which it is perfectly clear that the new employer plans to retain **all** of the employees in the unit (emphasis added)).

[312] CO-OP City, 340 NLRB 35 (2003)(successor employer violated Section 8(a)(2) of the Act by recognizing a union before a substantial complement of the employees who would make up the bargaining unit were employed); First Student, 2006 NLRB LEXIS 53, *15 (2006)("It is axiomatic that under Section 8(a)(2) of the Act, an employer may not recognize a union as the collective bargaining representative of employees in a particular unit if the union does not, in fact, represent those employees.").

[313] In Fall River, the employer challenged the holding of Burns, arguing that the "perfectly clear" doctrine should be used in determining whether an employer is a successor. The Supreme Court rejected this argument, stating: the "perfectly clear" successor exception created in Burns "**was made [only] after the Court had resolved the successorship issue** and when it was examining **whether a successor** would have to bargain with the union before setting the initial terms and conditions of employment."[313] Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. at 47 (emphasis added). In other cases the Board has held that if the General Counsel does not meet the Burns

evidence establishes that RHS did not employ a majority of Preferred employees, RHS had no duty to bargain with or recognize the union and was free to set its own terms and conditions of employment.

b. Even if the analysis was appropriate, RHS was not a "perfectly clear" successor.

Neither of the limited circumstances for the "perfectly clear" successor exception apply here. The Supreme Court first articulated the "perfectly clear" exception in Burns, stating that the exception only applies in "exceptional" circumstances when it is "perfectly clear" that the successor will retain all the employees in the unit. Id. at 294-295. The Board clarified the holding in Spruce-Up Corp., 209 NLRB 194 (1974), when it stated:

> the caveat in Burns, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

RHS did not mislead employees but repeatedly informed employees that they were subject to an application process, that new terms and conditions would apply, and that it was rejecting the collective bargaining agreement. It also repeatedly announced its intent to implement new terms and conditions. Because neither Spruce Up circumstance applies, RHS was not a "perfectly clear" successor.

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successor test then the "perfectly clear" doctrine does not apply. Atlantic Technical Services Corp.,202 N.L.R.B. 169, 169-170 (1973)(ALJ found employer was a "perfectly clear" successor, but NLRB sustained employer's objection to this finding because the Burns successorship test was not met as there was no continuity of operations); Canteen Corp. v. NLRB, 103 F.3d 1355, 1361 (7th Cir. 1997)(the "perfectly clear" doctrine is a "corollary" to the Burns doctrine).

i. RHS did not mislead Preferred employees into believing that they would be hired with no changes in their wages, hours, or working conditions.

RHS did not mislead employees into believing that all would be retained with no changes.[314] RHS message was consistent from its first communication that the collective bargaining agreement would not apply, employees would be required to proceed through an application process, and certain new terms and conditions would be implemented.

- On July 15, 2013, more than two months before the start of operations, Ms. Brown unequivocally told the union that she did not intend to honor the collective bargaining agreement.[315]

- By at least August 2013, before offers of employment were made, RHS told Preferred employees that wages would change, insurance would change, PTO would be different, bonuses would change, there would be no seniority, shifts would change, and that the company would use Helping Hands.[316]

- The application employees completed made clear that they were applying for "at-will" employment[317] and applicants were asked in interviews what they would like to change.[318]

- If it was not already crystal clear that employees would be working under different terms and conditions, the offers of employment sent in September 2013 specifically stated "your employment with Ridgewood Health Services, Inc., will be at-will" and "your employment also will be subject to the terms and conditions of employment which will be set by Ridgewood Health Services, Inc., and which may change from time to time."[319]

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[314] RHS anticipates that the USW will attempt to argue that employees were misled into accepting employment based on the testimony of witnesses who were not offered or did not accept offers for bargaining unit positions. See,e.g., Eaton 82 (offered job but declined); McPherson 104 (not offered position); Uptain 233, Collett 348. Such testimony is irrelevant, because these employees did not accept a bargaining unit position.

[315] J-4. It is well-established that a communication to the union is the same as a communication to employees. See Marriott Management Services, Inc., 318 NLRB 144 fn. 1 (1995).

[316] See supra Statement of Facts, § D.2.

[317] See e.g., J-26, p. 4.

[318] See e.g., T 141 (McClain), 200 (Tidwell), 222 (Borden).

[319] J-12.

Based on these repeated communications, it cannot reasonably be argued that Preferred's employees were misled into believing that they were accepting employment with RHS on the same terms and conditions they had with Preferred.

Moreover, union-represented employees testified to the clarity of RHS's intent from the communications.[320] Union President Cindy Dudley testified that employees knew about the letter which stated that the Company was rejecting the contract and that "everybody was upset." Furthermore, the USW filed charges challenging the repudiation of the agreement. The USW cannot now claim "perfectly clear" successor status when earlier it swore under oath (prior to RHS offering Preferred employees employment) that RHS had repudiated the collective bargaining agreement and set new terms and conditions:

> August 12, 2013 Charge against RHCC (filed August 19, 2013): RHCC "has violated Section 8(a)(5) of the Act by its repudiation of the collective bargaining agreement between the employer and the Charging Party."[321]
>
> September 13, 2013 USW Request for Information (seeking, among other documents "A detailed account of the Company's . . . plans to re-hire employees who have received notice of layoff, including how many such employees will be re-hired" and "Descriptions of meetings . . . in which current or forthcoming changes to terms of and conditions of employment have been or will be communicated."). (JE 9).
>
> September 19, 2013 Charge against RHCC & RHS: RHCC & RHS "has violated Section 8(a)(5) by announcing unilateral changes in terms and conditions of employment including seniority, health insurance, and wage rates; engaging in direct dealing and circumventing the Union by meeting with employees to announce changes in terms and conditions of employment; [and] engaging in direct dealing and circumventing the Union announcing to employees that they are "at will" and that terms of employment will be set unilaterally by Employer."[322]

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[320] T 311 (Dudley).

[321] See USW Unfair Labor Practice Charge, 10-CA-111458, filed August 19, 2013, available at http://nlrb.gov/case/10-CA-111458, and attached as "Exhibit A" to this Brief. Keren Wheeler of the USW Legal Department signed the charge declaring it to be true to the best of her knowledge and belief on August 12, 2013.

[322] See GC-1(a); USW Unfair Labor Practice Charge, 10-CA-113669, filed September 19, 2013, "[a]mending and adding to the charges filed in 10-CA-111458."

Conveying a desire to keep most of the employees and some terms and conditions the same is not enough. The controlling case here is Banknote Corp. of America, 315 NLRB 1041 (1994), enfd. 84 F.3d 637 (2nd Cir. 1996), cert. denied 519 U.S. 1109 (1997). In Banknote, prior to beginning operations, the new employer announced its "intention to attempt to hire its initial work force from among the employees currently working at the Ramapo facility." Further, the "only changes in terms and conditions of employment which were announced prior to hiring the employees were a desire for flexibility in terms of job functions, and that the health benefits in effect at that time with ABN would continue for a period of 60 days." Id. at 1042. Nevertheless, the new employer was not a "perfectly clear" successor because it disavowed the predecessor's union contract prior to making offers of employment:

> Although in its March 23 letter to the Unions the Respondent stated its "intention to attempt to hire its initial work force from among the employees currently working at the Ramapo facility," this letter also effectively announced that it would be instituting new terms and conditions of employment. Specifically, the Respondent's statements in the March 23 **letter disavowing the notion that the Respondent had agreed to be bound by the terms and conditions of the ABN collective-bargaining agreements and declaring that the Respondent had "not made any such commitments" put the employees on *notice* that the Respondent would be making changes in the employment terms of the predecessor**. **In our view, the Respondent's statements in the letter convey to the predecessor's employees the message that the Respondent would not be adopting the predecessor's terms and conditions of employment.** Thus, simultaneous with its stated intention to retain the predecessor's employees, the Respondent announced new terms and conditions of employment. Subsequently, specific anticipated changes were communicated to the Unions and to three of the prospective employees **at their interviews**. Under these circumstances, we conclude that the Respondent was not a "perfectly clear" successor under Burns, and that its bargaining obligation did not attach until it hired the employees on April 19.

The union makes much of the fact that RHS expected to recognize the union, told employees most would be hired, and indicated to the union that it would be open to

bargaining.[323] RHS did anticipate that it would hire a majority of Preferred's employees, and acted accordingly, but this does not make it a "perfectly clear" successor as discussed above. As the Board stated in Spruce Up, where it found the successor employer, who told employees it intended to hire most of them, but later offered employment contingent upon the acceptance of new terms, was not a "perfectly clear" successor:

> For an employer desirous of availing himself of the Burns right to set initial terms of employment would, under any contrary interpretation, have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms, a right to which the Supreme Court attached great importance in Burns.[324]

Based on the facts here and the controlling law, RHS did not mislead employees into accepting employment because they believed the same terms would apply. On the contrary, the evidence is clear that employees and the union knew that terms and conditions were going to change before employees were offered employment, were "upset" about such changes, and challenged RHS actions.

ii. RHS clearly announced its intent to establish a new set of conditions prior to offering Preferred employees employment.

Similarly, the second application of the "perfectly clear" exception does not apply because RHS unmistakably conveyed its intent to establish new terms and conditions of employment, first with the July 15, 2013 letter rejecting the collective bargaining agreement, and followed by meetings with employees describing and discussing changes and offer letters making their employment subject to such changes. The successor need not announce all of the

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[323] The cases the union will cite are easily distinguishable from the one here. Canteen, 317 N.L.R.B. 1052 (N.L.R.B. 1995)(employer became a perfectly clear successor when, after negotiating over other terms and conditions of employment, the union and employer agreed that all of the "predecessor employees [would] serve a probationary period with the Respondent."); Hilton Environmental Inc., 320 N.L.R.B. 437, 437-438 (N.L.R.B. 1995)(after soliciting applications, interviewing employees, and not informing employees that any terms and conditions of employment would change, employer told employees "that it intended to hire all Son's employees unless some problem arose as a result of information disclosed on their job application forms.").

[324] Spruce-Up Corp., 209 NLRB at 195 (1974).

specifc changes, but just needs to clearly announce its *intent* to establish new terms and conditions of employment.[325]

Statements that an employer wants to keep pay the same or close to the same are not sufficient. In Banknote, even though the employer announced an intent to hire the entire workforce with the only changes being flexibility in job functions and a change in health benefits after 60 days, the "perfectly clear" exception did not apply because the employer disavowed the contract and put employees on notice of changes. 315 N.L.R.B. at 1042. Here, RHS disavowed the contract, asked employees in interviews what needed to be changed or improved, held meetings with employees discussing changes, and conditioned their offer on the acceptance of new terms and conditions. RHS's expression of intent to change terms far exceeded that in Banknote, and so, RHS was not a "perfectly clear" successor.[326]

C. The Remaining Allegations Are Contingent On RHS Being Found a Successor.

Because the USW does not represent the employees at the Ridgewood facility, Ms. Brown can implement the terms and conditions of employment that she believes are necessary to operate the facility. As such, General Counsel's remaining claims that Ms. Brown failed to bargain with the union, provide requested information, made changes to terms and conditions of

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[325] In S & F Mkt. St. Healthcare LLC v. N.L.R.B., 570 U.S. 354, 360 (D.C. Cir. 2009the D.C. Circuit reversed the Board's finding of "perfectly clear" successor status, finding "[t]he Board not only muffed its reading of the record; it also misread Burns to require more from the successor employer than a portent of employment under different terms and conditions. Recall that the 'perfectly clear' exception applies only to cases in which the successor employer has led the predecessor's employees to believe their employment status would continue unchanged after accepting employment with the successor. Here, as we have seen, the employees had every indication – from S & F's job applications, interviews, and letters offering employment – that S & F intended to institute new terms of employment.").

[326] Specialty Envelope Co., 321 NLRB 828, 831-832 (1996)(employer not a "perfectly clear" successor because, before extending job offers to the predecessor's employees, employer distributed application packet which set out new terms and conditions of employment that would be in effect when it began operations); First Student Inc., 2013 NLRB LEXIS 771 (N.L.R.B. Dec. 13, 2013) (ALJ decision)(employer not a "perfectly clear" successor, even though employer told employees in the initial meeting that it would maintain the current wages, intended to hire a majority of the school district's employees if they met the company's protocol, and the company had hired 80 to 90 percent of the existing workforce at other facilities, because the employer "clearly and unequivocally announced new terms of employment substantially before it commenced operations").

employment, and/or disciplined employees all fail as a matter of law because RHS is not a successor.[327]

D. RHCC Is Not a Proper Party to the Case.

Ridgewood Health Care Center, Inc. (RHCC) is the entity that owns the "bricks and mortar" of the Ridgewood facility.[328] The General Counsel has not established that it has jurisdiction over RHCC, and thus it is not a proper party to this case. First, the General Counsel has not established that RHCC has been an employer engaged in commerce within the meaning of 2(2), (6) and (7) of the NLRA. The General Counsel alleged that RHCC purchased and received goods or materials valued in excess of $5,000.00 directly from points outside the State of Alabama.[329] RHCC denied that allegation, and the General Counsel never proved it to be true. In fact, the parties stipulated that RHCC's only source of income has been the lease payments from the in-state facility operators.[330] Second, RHCC has not operated the facility or employed any individuals at any time relevant to these proceedings.[331] Thus, it is not an "employer" under the NLRA.[332] Third, it is not a health care institution as alleged by the General Counsel because it does not provide direct patient care.[333] Finally, RHCC is not a single employer with RHS because it is not an employer at all. Also, it does not have any control of labor relations at the

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[327] In any event, some of the employees were not terminated - Caitlin Bollinger – and reinstatement and backpay would be improper.

[328] J-2, ¶ 2

[329] GCX-1, 1(r)

[330] J-2, ¶ 8

[331] J-2, ¶ 3, 19, 21 – 24, 28

[332] 29 U.S.C. § 152(2)

[333] Damon Medical Laboratory, Inc., 234 NLRB 333 (1978) (stating that "the legislative history makes it clear that the special provisions of the Act applicable to health care institutions relate to 'patient care situations' and not to 'purely administrative health care connected facilities.'")

facility, which is recognized by the Board as the most important criterion in determining single employer status.[334] For these reasons, RHCC should be dismissed from the case.

IV. CONCLUSION

Based on the foregoing, the Complaint is due to be dismissed.

/s/Ashley H. Hattaway
Ashley H. Hattaway
Ronald W. Flowers

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[334] Television & Radio Artists Washington-Baltimore Local, 185 NLRB 593 (1970), *enforced*, 462 F.2d 887 (D.C. Cir. 1972) (holding common ownership is not sufficient and that control of day-to-day operations and labor policies is paramount)

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2015, I served the foregoing Post-Hearing Brief via E-Mail to the following:

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OF COUNSEL

FORM NLRB-501 (2/08)

EXHIBIT A

FORM EXEMPT UNDER 44 U S C 3512

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
10-CA-111458	8-19-2013

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Ridgewood Health Care Center and its alter ego Ridgeview Operating Company and its joint employer Preston Health Services

b. Tel. No. (205)221-4862
c. Cell No.

d. Address *(street, city, state, and ZIP code)*
201 Oakhill Road
Jasper, AL 35504

e. Employer Representative
Cindy Shifflett, Administrator

James M. Smith, attorney
2000 SouthBridge Parkway Ste 601
Birmingham, AL 35209
jsmith@hallawfirm.com
(205) 380 - 2208

f. Fax No. (205)384-6404
g. E-Mail
h. Number of workers employed
141

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Nursing Home

j. Identify principal product or service
Nursing home services

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a), subsections (1) and *(list subsections)* (3) & (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

Within the past six months, Ridgewood Health Care Center, with and through its alter ego Ridgeview Operating Company, has violated Section 8(a)(5) of the Act by its repudiation of the collective bargaining agreement between the employer and the Charging Party.

Within the past six months, Ridgewood Health Care Center, with and through its joint employer Preston Health Services, and with and through its alter ego Ridgeview Operating Company, has violated Section 8(a)(3) of the Act by the initiation of the discriminatory layoff of 141 employees and by the discriminatory transfer of its business operations in order to avoid its obligations under the Act.

The Charging party seeks relief under Section 10(j) of the Act and requests that the Board immediately enjoin the above-named employer(s) in its/their repudiation of the collective bargaining agreement, discriminatory layoffs, and discriminatory transfer of work.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC and its Local 9201-04

4a. Address *(street and number, city, state and ZIP code)*
Five Gateway Center
Room 807
Pittsburgh, PA 15222

4b. Tel. No. 412-562-2413
4c. Cell No.
4d. Fax No. 412-562-2574
4e. E-Mail: kwheeler@usw.org

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*.
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By _____
(signature of representative or person making charge)

Address Five Gateway Center, Room 807, Pittsburgh, PA 15222

Keren Wheeler
USW Legal Department
(Print/type name and title or office, if any)

Date: 8/12/13

Tel No 412-562-2413
Office, if any, Cell No.

Fax No. 412-562-2574

e-Mail kwheeler@usw.org

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. ' 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary, however, failure to supply the information will cause the NLRB to decline to invoke its processes